## EXECUTIVE ORDERS AND PRESIDENTIAL DIRECTIVES

### **HEARING**

BEFORE THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE

# COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

MARCH 22, 2001

Serial No. 10

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

72–142 PS WASHINGTON : 2001

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## EXECUTIVE ORDERS AND PRESIDENTIAL DIRECTIVES

### THURSDAY, MARCH 22, 2001

House of Representatives,
Subcommittee on Commercial
AND Administrative Law,
Committee on the Judiciary,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:05 a.m., in Room 2237, Rayburn House Office Building, Hon. Bob Barr [Chairman of the Subcommittee] presiding.

### OPENING STATEMENT OF CHAIRMAN BARR

Mr. BARR. I would like to call to order this session of the Subcommittee on Commercial and Administrative Law. The subject matter of our hearing today, with a very distinguished panel, will be executive orders and presidential directives.

Executive orders are the primary means by which the President makes official statements concerning the function and management of the Executive branch of the Federal Government. Executive orders have been used by every President since George Washington.

The President's authority to issue executive orders derives from powers both enumerated, implied and inferred by the Constitution, as well as from authority delegated to the President by Federal statute.

In the overwhelming majority of cases, executive orders and proclamations are an appropriate public way of guiding the actions of numerous Federal agencies and other components of the Executive branch. While thousands of executive orders have been issued over the last two centuries, Federal courts have been extremely reluctant to challenge executive authority. When executive orders are issued without a constitutional or legal basis, they implicate the Separation of Powers Doctrine that underpins divided government. The Separation of Powers Doctrine allocates responsibility to each branch to energetically exercise and zealously defend its constitutional prerogatives.

In the proper exercise of its authority, Congress has an ongoing responsibility to affirm its lawmaking primacy and to closely monitor executive action that might usurp its exclusive legislative mandate

Advocates of an assertive executive have contended a President should be accorded broad deference to issue executive orders, even in the absence of clear legal authority. They have argued the President is uniquely capable of formulating national policy and that ex-

ecutive orders are an efficacious way of circumventing the parochial institutional intransigence of Congress.

This attitude was all too prevalent during the Clinton administration. Former President Clinton's senior domestic policy advisor, Paul Begalla, summed it all up when he remarked, "Stroke of a pen, law of the land, kind of cool."

Well, it's not kind of cool. Fidelity to constitutional self-government requires adherence to the formal legislative process the framers skillfully drafted into our founding document. When Congress yields its delegated powers to the President, or fails to check executive overreach, it not only undermines its own power, but mars the constitutional fabric carefully tailored by the Founders to preserve

and protect our individual liberties.

Former President Clinton's designation of millions of acres of Federal land as so-called "national monuments", under the purported authority of the Antiquities Act of 1906, raises a host of legal questions that Congress has a responsibility to address. First, were these designations consistent with the Antiquities Act and Federal statutes governing Federal land management generally? Second, are there steps Congress can take to address potential abuses of the authority granted to the President under the Antiquities Act? And, how can Congress reassert its constitutional responsibility to manage Federal lands?

We examine these issues today not to embarrass or impugn the motives of any former President, but to keep faith with the solemn responsibility the Founders entrusted to each of us in Congress; that is, to vigorously assert our legislative authority and to closely monitor activities of the Executive branch which might threaten it.

Before we begin, I would like to personally welcome a fellow Member of Congress, Chairman Jim Hansen of the House Resources Committee, as well as the other distinguished witnesses who will present their views this morning, who we will introduce very shortly.

What I would like to do at this time is recognize Miss Baldwin

for any opening statement.

Ms. BALDWIN. I have no opening statement at this time, thank you.

Mr. BARR. Okay, thank you.

Does the gentleman from Pennsylvania, the distinguished former Chairman of this panel, have an opening statement?

Mr. Gekas. No. I'm just watching the Chairman-

Mr. BARR. You would know.

Mr. Gekas [continuing]. To see if he measures up to the standards that we set the last 6 years. [Laughter.]

No, I'm grateful for the Chairman's choice of subjects for this first hearing, and I will be eager to hear the witnesses. Thank you.

Mr. BARR. Thank you very much.

At this time, since this is the first convening of this panel under new leadership, I would like to formally on the record commend the gentleman from Pennsylvania for his very, very distinguished stewardship of this Committee for the last 6 years. You did set very high standards, indeed, and we hope to and anticipate doing everything we can to measure up to those standards which you have set. We thank the gentleman very much for his leadership and his continued involvement with this very, very important Subcommittee of

the Judiciary Committee.

I would like at this time to introduce the panel. First, Congressman Jim Hansen was elected to the United States Congress from Utah's 1st Congressional District in 1980, and is now serving his 11th term in the Congress. Congressman Hansen is the Chairman of the House Resources Committee and also serves as a senior member of the Armed Services Committee.

Previous public service includes four terms in the Utah House of Representatives, where he was Speaker of the House his last term. Prior to serving in the Utah Legislature, he served in local govern-

ment as a three-term city councilman for Farmington, UT.

Mr. Hansen served in the United States Navy during the Korean war. Before becoming a Member of Congress, he was an independent insurance agent and president of a Utah land development

company. He is a graduate of the University of Utah.

Mr. Bruce Fein. Bruce Fein is a graduate of Swathmore College and an honors graduate of Harvard Law School. Mr. Fein is a nationally recognized authority on constitutional and international law. He served as Associate Deputy Attorney General under former President Ronald Reagan, General Counsel to the Federal Communications Commission, and as Counsel to the Congressional Iran-Contra Committee. He has also served at the Department of Justice, where he supervised litigation of the Criminal Division.

Mr. Fein has been a visiting scholar at The Heritage Foundation and an adjunct scholar at the American Enterprise institute. Mr. Fein is also a weekly columnist for the Washington Times and a guest columnist for USA Today, as well as many other important

publications.

According to the National Law Journal, Mr. Bruce Fein is one of the sixth most quoted attorneys in the mass media, and has more than 500—he can update us on that number today—television and

radio appearances to his credit.

Mr. Todd Gaziano is a Senior Fellow in Legal Studies, and Director of the Center for Legal and Judicial Studies at The Heritage Foundation. He is a graduate of the University of Chicago Law School and a former law clerk on the U.S. Fifth Circuit Court of Appeals.

Mr. Gaziano has served in the U.S. Department of Justice in the Office of Legal Counsel during different periods in the Reagan, first Bush, and Clinton administrations, where he provided constitutional advice to the White House and to four Attorneys General.

Mr. Gaziano has also served in the House of Representatives as Chief Counsel for the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, where he worked on government-wide regulatory reform legislation.

To introduce our fourth distinguished panel member today, I would like to yield to the gentlelady from Wisconsin, Miss Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman.

I would like to provide a warm Wisconsin welcome to Professor Ken Mayer. He is a professor of political science at the University of Wisconsin, Madison, and Director of the University of Wisconsin Data and Computation Center.

He received his doctorate from Yale University and has been teaching at the University of Wisconsin since 1989. His research focuses on American politics, with a focus on the presidency, Congress, and campaign finance. Prior to coming to the University of Wisconsin, he consulted for the Washington, D.C. offices of the Rand Corporation and worked as a civilian contract specialist for the Naval Air Systems Command.

His books include, "The political economy of defense contracting," published by Yale University Press in 1991; "The Dysfunctional Congress, the Individual Roots of an Institutional Dilemma," by Westview Press in 1998; and hot off the presses, his latest book, "With the Stroke of a Pen, Executive Orders and the Presidential

Power", offered by Princeton University Press this year. Mr. BARR. I thank the gentlelady from Wisconsin.

We are joined by the Ranking Member, Mr. Watt, from North Carolina. I would yield now to the gentleman, the Ranking Mem-

ber, for any opening statement he might care to make.

Mr. WATT. Mr. Chairman, I appreciate you scheduling the hearing. I apologize for being late, I'm not getting around as quickly as I normally do, because I pulled a muscle. So it took me a little while to get back. But I'm looking forward to hearing the witnesses and exploring the historical and constitutional background for executive orders. I think it's an important subject matter.

With that, I will yield back so that we can hastily get to the wit-

nesses.

Mr. BARR. I thank the distinguished gentleman.

What we would like to do, with the indulgence of the panel, is start with Representative Hansen, if we might, and in deference to the Member's schedule, with his Committee responsibilities and responsibilities on the floor, as soon as you conclude your statement, Mr. Hansen, we'll have any questions posed to you and then we'll move on to the rest of the panel.

Congressman Hansen.

### STATEMENT OF THE HONORABLE JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. Hansen. Thank you, Mr. Chairman, and I thank the members of the Committee for allowing us to talk for just a moment,

basically regarding the 1906 Antiquities law.

Not an awful lot of folks realize that in about 1888 a number of ranchers, especially two ranchers, they found some Indian ruins out there in the West. They started looking at them and discovered that this would be a pretty good way to make some money. A lot of people liked having those antiquities, and so they started selling them.

President Teddy Roosevelt, who was very familiar with the West-You read about this man. He was out there on a regular basis. He understood the Grand Canyon, that whole Basin area, and spent many, many hours and days and months in that area. He asked that they pass this 1906 antiquities law basically to curtail that kind of action on the part of people who were desecrating those areas—probably a pretty good idea.

What a lot of folks don't realize is there was not the 1916 Organic Act that started the parks. There wasn't a 1964 Wilderness Act; there wasn't a 1969 NEPA Act; there wasn't the '76 FLPMA Act, and a dozen other acts that protect the ground. At that times that's really all there was.

Out of that came some of our better parks, and I think Grand Canyon is a good example, Zion and some of those areas brought about. Our last President, former President Clinton, he made 19 national monuments.

Now, let me talk about one I am very familiar with, and that happened on September the 18th, 1996, just prior to the general election, and they created the Grand Staircase-Escalante in southern Utah, 1.7 million acres.

Let's go back to the Antiquities Act for just a minute and talk about it. That Act is there, and the proclamation should go this way: the President declares whether it's a scientific, an archeological, or historic site, and then it says he shall use the smallest acreage available to protect that site.

The 74 monuments we had prior to President Clinton weren't very big. You take the one, the archeological site of the Rainbow Bridge, which is obviously an archeological site, relatively small. The historic site of the Golden Spike, where the two trains met, obviously quite small.

I guess, in my 42 years of being an elected official, as you mentioned, from the city council to the state legislature, whom I was Speaker of the Utah House, and here for 20 years, I always was of the opinion that you started out with the people on the ground and you said, "What is it we can work out?" My years of being on the Resource Committee, you should really figure out how long does it take to make a monument or a park if we do it.

We're talking almost two or 3 years. We're talking about studies.

We're talking almost two or 3 years. We're talking about studies. We're talking about people on the ground, talking about surveys. It takes a long, long time to do these things. Even the one we recently did last year for Mary Bono, a monument, it took us almost two-and-a-half years to put that one together, starting with her husband, as I may recall.

Well, on that date that I previously gave, President Clinton went to the south rim of the Grand Canyon, and he looked across there into the Utah side and declared 1.7 million acres as a monument. He did not declare what it was. He did not say this is the archeological park, this is a scientific park, this is a historic site. None of that was said. He did say—he was a little upset about the Andalex Coal mine that possibly was going there. He made the statement, which I think is a classic statement, he said we can't mine everywhere—I think some people would agree you can only mine where there's ore or minerals. But anyway, that stopped that. That's another story entirely, which I guess I won't get into.

But what bothered me about it, Mr. Chairman, goes this way. I was chairing the committee on Public Lands and Parks at the time, so I was kind of in charge of that type of thing. The Governor of the State, Mike Leavitt, didn't hear about it. I didn't hear about it. The two Senators didn't hear about it. Our Democratic colleague and good friend from the Third District, Bill Orton, wasn't made aware of it until hours before it happened, as the Governor was made aware of it at two o'clock in the morning and it happened at

ten o'clock that same day. It's kind of a great concern to the folks out in Utah, to have that occur.

But as you go back—and we subpoenaed the papers. It kind of upset us a little bit. We got all of the papers from the White House. We also got the papers from the Interior Department and others. We wrote a little pamphlet called, "Behind Closed Doors." Why we did that, Mr. Chairman, is because what we found in this is pretty well what my Chief of Staff found when she called Kathleen McGinty of the Counsel on Environmental Quality the day before. She said to Kathleen McGinty, "we're hearing this rumor that the President is going to go out to Utah and create a large monument. Is there any truth in it?" We saw something in the Post and we saw something in the New York Times. She said, "No, there's not any truth to it. We hear the same rumor."

Now, if you go to the pamphlet that I would like to leave with you, if I could, Mr. Chairman, copies for every member, this is some of the things we have found.

Mr. BARR. Without objection, it will be entered into the record. [The report entitled "Behind Closed Doors" follows:]

### "Behind Closed Doors: The Abuse of Trust And Discretion In The Establishment Of The Grand Staircase-Escalante National Monument."

Majority Staff Report Subcommittee on National Parks & Public Lands Committee on Resources

> U.S. House of Representatives One Hundred Fifth Congress First Session November 7, 1997 Washington, D.C.

Printed for the use of the Committee on Resources

<u>Don Young</u>, Chairman

### Legislative Study and Investigative Staff Report on Abuse of Discretion in the Creation of the Grand Staircase-Escalante National Monument Under the Antiquities Act

November 7, 1997

Majority staff of the Committee on Resources, Subcommittee on National Parks & Public Lands submits the following staff report to the Members of the Committee,

"Behind Closed Doors: The Abuse of Trust And Discretion In The Establishment Of The Grand Staircase-Escalante National Monument."

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### CHAIRMAN'S SUMMARY

The majority staff of the House Committee on Resources will release a staff report today on the subpoenaed national monument documents received from the Clinton administration. The documents show that the designation of the Grand Staircase-Escalante National Monument was politically motivated and probably illegal.

It is very important that these documents are opened up for public scrutiny. They show the American people that the designation of the monument was politically motivated; that the administration engaged in a concerted effort to keep everything secret in order to avoid public scrutiny; and that the administration admitted that the lands in question weren't in danger and weren't among the lands in this country most in need of monument designation.

The White House abused its discretion in nearly every stage of the process of designating the monument. It was a staff drive effort, first to short-circuit a congressional wilderness proposal, and then to help the Clinton-Gore re-election campaign. The lands to be set aside, by the staff's own descriptions, were not threatened. ''I'm increasingly of the view that we should just drop these Utah ideas \* \* \* these lands are not really endangered."--Kathleen McGinty, chair, Counsel on Environmental Quality [CEQ].

The documents also show that claims by the administration that the monument was created to save Utah from foreign coal mining was nothing but a front to make the idea look legitimate. The administration was already several months into the process of creating the monument before anyone even mentioned throwing in the Kaiparowits Plateau. The administration added the Kaiparowits, with its attendant Andalex coal leases, at the last minute so they could claim they were protecting some endangered lands.

The documents are loaded with evidence of a concerted effort by the Department of the Interior [DOI] and CEQ staff to circumvent the National Environmental Policy Act [NEPA]. Staff was aware that the law requires NEPA compliance, with its attendant public input process, when national monument proposals come out of an agency. The documents show how DOI and CEQ spent months trying to create a paper trail to make it look like the idea came directly from the President. "We need to build a credible record that will withstand legal challenge \* \* \* so [this] letter needs to be signed asap so that the secretary has what looks like a credible amount of time to do his investigation of the matter."--Kathleen McGinty, chair, Counsel on Environmental Quality [CEQ].

Probably the most telling, yet unsurprising, document is where CEQ Chair Kathleen McGinty fills-in President Clinton on the Political Purpose of the national monument designation: ''It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the

Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration

Ms. McGinty continued by noting that: ``[T]he new monument will have particular appeal in those areas that contribute the most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Phoenix-Tucson area."

Ms. McGinty noted that there would be a few who would oppose the designation, but they were generally those `who in candor, are unlikely to support the Administration under any circumstances". Translation: Designating the monument would help get Clinton western electoral votes in the 1996 election. He would lose Utah, but he didn't have a chance at winning that State anyway.

These documents should make it clear to the American people that the real reason that the administration used the Antiquities Act on these lands was to circumvent congressional involvement in public land decisions, to evade the public involvement provisions of NEPA, and to use our public lands as election year props. The Clinton administration's actions show not only a disregard for the State of Utah, but a blatant disregard for America's public land laws, and a contempt for the democratic process.

James V. Hansen, Chairman Subcommittee on National Parks & Public Lands

### INTRODUCTION:

### COMMITTEE REVIEW OF THE DESIGNATION OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

On September 18, 1996, President Clinton established, by Presidential Proclamation No. 6920, the 1.7-million-acre Grand Staircase-Escalante National Monument (''Utah Monument") in Utah pursaunt to Section 2 of the Act of June 8, 1906 (''Antiquities Act"). The Committee on Resources has jurisdiction over the Antiquities Act and the creation of the Monument, jurisdiction that is delegated under Rule 6(a) of the Rules For the Committee on Resources (''Committee Rules") to the Subcommittee on National Parks and Public Lands.

The Subcommittee has a continuing responsibility under Rule 6(d) of the Committee Rules to monitor and evaluate administration of laws within its jurisdiction. In relevant part, that rule states: ``... Each Subcommittee shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those statutes or parts of statutes, the subject matter of which is within that Subcommittee's jurisdiction; and the organization, operation, and regulations of any Federal agency or entity having responsibilities in or for the administration of such statutes, to determine whether these statutes are being implemented and carried out in accordance with the intent of Congress. . . . "

The Subcommittee, in concert with the Full Committee, undertook its Rule 6(d) responsibility when, on March 18, 1997, Chairman Young and Subcommittee Chairman Hansen initiated a review of the creation of the Monument. Some records were produced by the Council on Environmental Quality (CEQ) and the Department of the Interior (DOI) pursuant to a March 18, 1997, request to the Chair of CEQ and the Secretary of DOI related to the review. The documents that were produced were utilized by unanimous consent at a Subcommittee oversight hearing on April 29, 1997.

However, CEQ Chair Kathleen McGinty refused to produce copies of embarrassing documents that

revealed why--beyond the reasons stated in the proclamation and publicly--the monument was created. Staff was given access to some of the documents and Members to others in an attempt to accommodate stated Administration desires to keep the documents secret because the Administration claimed they might be "privileged." However, constitutional executive privilege was never officially asserted by the President over the documents.

Chairman Young was delegated the authority to subpoen a Monument records by the Committee on September 25, 1997. After a protracted legal exchange between the White House and Committee staff on the applicability of privileges to the documents withheld, Chairman Young, on October 9, 1997, issued the subpoena for the records withheld by CEQ Chair Kathleen McGinty.

The subpoena was unreturned on the due date and the committee staff began preparing a contempt resolution. However, on Wednesday, October 22, 1997, the Counsel to the President, Charles F.C. Ruff, produced the subpoenaed documents to the Committee. (1)

The delay--from March through October 1997--in producing the ultimately subpoenaed documents thwarted efforts of the Subcommittee and Committee to properly undertake its duties under Article I and Article IV of the Constitution and Rule 6(d) of the Committee Rules. The Subcommittee hearing on the matter had already been held and the remaining days in the first session of the 105th Congress were limited. The Committee is actively considering legislation that modifies the Antiquities Act.

As a result of the delay, the Chairman and Subcommittee Chairman requested this legislative study and investigative majority staff report. The request was to analyze and append relevant documents produced under the subpoena that show if there were abuses of discretion by the President and his advisors in the execution of the Antiquities Act to create the Utah Monument and whether that Act was being implemented and carried out in accordance with the intent of Congress. This legislative study and report responds to that request. This report was developed for and provided to Members of the Committee on Resources for their information so that Members can under take their legislative and oversight responsibilities under the Constitution, the Rules of the House of Representatives, and the Rules for the Committee on Resources.

#### THE LAW: ANTIQUITIES ACT MONUMENT DESIGNATIONS

The Antiquities Act can be summarized simply. By proclamation, the President may reserve federal land as a National Monument. The land must be a historic landmark, a historic or prehistoric structure, or an object of historic or scientific interest. In addition, the reserved area must`in all cases" be ``confined to the smallest area compatible with the proper care and management of the objects to be protected." The Act contemplates that objects to be protected must be threatened or endangered in some way. (2)

### EXECUTIVE SUMMARY OF FINDINGS MONUMENTAL DECISIONS BEHIND CLOSED DOORS

"I'm increasingly of the view that we should just drop these Utah ideas . . . these lands are not really endangered."--CEQ Chair Kathleen McGinty.

The state of Utah was settled by hearty Mormon pioneers seeking to avoid persecution for their beliefs. They moved west in an effort to find wide, open spaces and freedom from intrusion into their affairs by their neighbors and the government. Now, more than a century later, the citizens of Utah have been forced to endure the ultimate government intrusion: a federal land grab of 1.7 million acres, taken in the dead of

night--with no public notice, no opportunity to comment, and no involvement of the Utah Congressional Delegation. Indeed, the Utah delegation was deceived about the imminent decision to designate the Grand Staircase-Escalante National Monument up until hours before the President's high-profile, public, campaign-style announcement.

Once again, at the hands of the Clinton Administration, the people of Utah were being persecuted for their beliefs. Had Utah been a pro-Clinton state, a state with prominent Democratic Members of Congress, or one that factored importantly into Clinton's re-election effort, then the land- grab would almost certainly not have occurred

In sum, the documents received by the Committee show several points quite clearly: (1) the designation of the Monument was almost entirely politically motivated; (2) the plan to designate the monument was purposefully kept secret from Americans and Utah Members of Congress; (3) the Monument designation was put forward even though the Administration officials did not believe that the lands proposed for protection were in danger; (4) use of the Antiquities Act was intended to overcome Congressional involvement in land designation decisions; (5) use of the Antiquities Act for monument designation was planned to evade the National Environmental Policy Act (NEPA). Indeed, its use was specifically intended to evade the provisions of NEPA and other federal administrative requirements, and to assist the Clinton-Gore reelection effort.

### IT'S POLITICS, STUPID--NOT THE ENVIRONMENT

The records and documents provided by the CEQ and DOI clearly demonstrate that the Administration's goal was political, not environmental, a fact that contradicts the Congressional intent of the Antiquities Act. The Clinton White House took pains to ensure that all prominent Democrats from neighboring states were not only warned in advance, but had an opportunity to give their views on the designation. In an August 14, 1996, memorandum for the President, CEQ Chair Kathleen McGinty opines that the monument designation would be politically popular in several key Western states. In Ms. McGinty's words: "This assessment squares with the positive reactions by Sentor [sic] Harry Reid (D-NV), Governor Roy Romer (D-CO), and Representative Bill Richardson (D-NM) when asked their views on the proposal. . . . Governor Bob Miller's (D-NV) concern that Nevada's sagebrush rebels would not approve of the new monument is almost certainly correct, and echoes the concerns of other friends, but can be offset by the positive response in other constituencies."

In fact, even non-incumbent Democratic candidates for office from states other than Utah were warned about the impending land grab. CEQ Chair Kathleen McGinty explained this in a moment of partisan candor in her September 6, 1996, White House weekly report: "I have called several members of congress to give them notice of this story and am working with political affairs to determine if there are Democratic candidates we should alert. We are neither confirming nor denying the story; just making sure that Democrats are not surprised."

It was only Republicans, the lone Utah Democratic Member, and Utahans who were to be kept in the dark. Even media outlets like the Washington Post were advised by insiders to the Utah Monument decision as evidenced by electronic mail (e-mail) traffic: "Brian: So when pressed by Mark Udall and Maggie Fox on the Utah monument at yesterday's private ceremony for Mo [Udall] Clinton said: 'You don't know when to take yes for an answer.' Sounds to me like it's going forward. I also hear Romer is pushing the president to announce it when he's in Colorado on Wednesday. . . . --Tom Kenworthy" (September 10, 1996 From Brian Johnson (CEQ press) to others at CEQ transmitting e-mail from Washington Post reporter Tom Kenworthy).

Another CEQ staffer commenting on the above e-mail: "Wow. He's got good sources and a lot of nerve." (September 10, 1996, response from Tom Jensen to Brian Johnson's e-mail previously forwarded).

The exchange continues: ``south rim of the grand canyon, sept 18th--be there or be square." (September 11, 1996, e- mail from Tom Kenworthy to Brian Johnson).

The exchange continues again: "Nice touch doing the Escalante Canyons announcement on the birthday of Utah's junior senator! Give me a call if you get a chance." (September 16, 1996, e-mail from Tom Kenworthy to Brian Johnson).

This e-mail traffic demonstrates that by September 10 and 11, 1996, the Washington Post clearly had been notified not only that the decision had been made, but when and where the announcement would be. By contrast, the Utah Congressional delegation was being told by Ms. McGinty and top CEQ staff on September 9 that no decision had been made and the delegation would be consulted prior to any announcement.

Moreover, CEQ, White House Staff, and DOI officials met with Utah's delegation staff again on September 16, 1996--two days before the Utah Monument designation--and continued to deny that a decision had been made to go forward with the designation. Meeting notes taken by Tom Jensen of CEQ at the September 16, 1996, meeting indicate the following exchange between Senator Hatch and Kathleen McGinty: ''Senator Hatch: 'Can you give us an idea of what the POTUS [President] will do before he does it? Don't want to rely on press.'" ''Kathleen McGinty: 'Yes. We need to caucus and will reengage.'"

This deception, a full week after the Washington Post knew all of the details of the Utah Monument designation and ``Utah event," allowed the White House to move forward without Congressional intervention.

In an August 14, 1996, memo to the President, CEQ Chair Kathleen McGinty candidly discusses the goal of the project—to positively impact the President's re-election campaign: "The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. . . It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration . . . Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances.

Many of the documents attempt to gauge the political impact of the action, yet the environmental impact of the decision is rarely explored. Regardless of the environmental impact, the Clinton-Gore campaign needed the Utah Monument to shore up its political base in the environmental movement. When environmental impact is explored in some documents, they note that the lands to be set aside under the designation are not environmentally threatened—a sentiment echoed by CEQ Chair Kathleen McGinty herself in a March 25, 1996, e-mail: "i'm increasingly of the view that we should just drop these utah ideas, we do not really know how the environs will react and i do think there is a danger of 'abuse' of the withdraw/ antiquities authorities especially because these lands are not really endangered."

In a March 22, 1996, e-mail, CEQ Associate Director for Public Lands Linda Lance agreed, warning against the Utah Monument designation because of the political impact of using the Act to set aside unthreatened lands: ``... [T]he real remaining question is not so much what this letter says, but the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation. presidents have

not used their monument designation authority in this way in the past—only for large dramatic parcels that are threatened, do we risk a backlash from the bad guys if we do these—do they have the chance to suggest that this administration could use this authority all the time all over the country, and start to argue that the discretion is too broad?"

However, sentiment changed a few days later. The March 27, 1996, e-mail from Linda Lance at CEQ to Kathleen McGinty who forwarded it to others at CEQ shows that DOI was keeping the Monument idea alive: "since i and i think others were persuaded at yesterday's meeting w/Interior that we shouldn't write off the canyonlands and arches monument just yet here's another try at a draft letter to Babbitt to get this process started."

Despite the fact that CEQ Chair advocated dropping the idea, and despite the fact that there is no indication that the President had given either CEQ or Interior any formal notice that he even knew about the idea, DOI was apparently hard (behind the scenes) for this monument. Still there was no letter in March, April, May, June, or July 1996 from the President to the Secretary directing work on designating a possible Utah Monument. At a minimum, this is a violation of the spirit of NEPA, a statute that CEQ is responsible for implementing. Both DOI and CEQ knew it was a violation. Hence, the urgency in seeking the letter from the President to the Secretary directing him to undertake work to designate the Utah Monument.

### THE ENDS JUSTIFY THE MEANS: NEPA, A LAW OF CONVENIENCE FOR THE CLINTON-GORE CAMPAIGN

No Presidential written direction to the Secretary of DOI emerged until August 7, 1996, and by then, the first planned announcement was only ten days away. Still, no one from state or local government, or the Utah Congressional delegation had been consulted. These actions, in the absence of written direction from the President, make a mockery of what CEQ Chair Kathleen McGinty testified was the overriding purpose behind NEPA: ''It provides the federal government an opportunity for collaborative decision-making with state and local governments and the public." (September 26, 1996, Testimony of Kathleen McGinty before the Senate Energy Committee.)

The National Environmental Policy Act created CEQ, and the Council is charged with reviewing and appraising federal activities and determining whether they comply with the requirements and policies of the Act. (See, National Environmental Policy Act, Section 204.) Those requirements include development of environmental impact statements (EIA) or NEPA documents by federal agencies for major federal actions. Nearly all major federal actions—like designating land—require some level of NEPA documentation and process. NEPA environmental impact statements receive public notice, public comment, and public hearings. There was a conscious effort to use the Antiquities Act to avoid these NEPA requirements altogether in the designation of the Utah Monument.

Under the Antiquities Act, at the direction of the President, a monument may be established unilaterally by the President under limited circumstances. Using the Antiquities Act had several benefits to the Clinton-Gore Administration: (1) it is not necessary to work with Congress; (2) it is not necessary to comply with the Administrative Procedures Act's requirements to provide public notice or opportunity to be heard; and (3) it is not necessary to comply with NEPA requirements to involve the public or establish an administrative record on environmental impacts.

In short, the Antiquities Act was used to override the chance that the views of the people of Utah--and most importantly, elected Members of the Utah delegation--would influence the Utah Monument decision. In fact, the documents demonstrate that evading NEPA was a major internal rationale for using the Antiquities Act. This is a striking example of how the Clinton-Gore Administration manipulated the law to the

advantage of the Clinton-Gore campaign for purposes of a ``Utah event".--an event that might make the insatiable desires of the environmentalist constituency happy for a moment. Alarmingly, the chief architects of the endeavor to evade NEPA were in the leadership of CEQ.-- the entity charged with overseeing NEPA. A draft memo dated July 25, 1996, from CEQ Chair Kathleen McGinty to the President revealed that use of the Act was a means to avoid NEPA: ``Ordinarily, if the (Interior) Secretary were on his own initiative to send you a recommendation for establishment of a monument, he would most likely be required to comply with NEPA and certain federal land management laws in advance of submitting his recommendation. But, because he is responding to your request for information, he is not required to analyze the information or recommendations under NEPA or other laws. And, because Presidential actions are not subject to NEPA, you are empowered to establish monuments under the Antiquities Act without NEPA review.''

Although this revealing paragraph was edited out of the final memo, it is alarmingly hypocritical that CEQ, the agency created by NEPA and charged with seeing that it is complied with, was clearly advising the President how to evade NEPA. The same July 25, 1996, draft, written by CEQ staffer Thomas Jensen, makes it clear, however, that this was the secret goal. Contrast this with the lofty public pronouncements from high-ranking CEQ officials about the importance that other government entities comply with NEPA: "The lack of attention to NEPA's policies speaks to the tendency of our society to devalue those provisions of law that are not enforceable through the judicial system. One answer to the common complaint that we live in an overly litigious society is for individuals and agencies to take seriously such provisions as the national environmental policy set forth in section 101 of NEPA. Absent such a trend, interested individuals will naturally be skeptical of approaches that are not amendable to a legal remedy." Dinah Bear, General Counsel, CEQ, "The National Environmental Policy Act: its Origins and Evolutions," Natural Resources and Environment, Vol. 10, No. 2 (Fall, 1995).

Contrast this with the testimony of CEQ Chair Kathleen McGinty to the Senate Energy and Natural Resources Committee within days of the designation (September 26, 1996): ''In many ways, NEPA anticipated today's call for enhanced local involvement and responsibility, sustainable development and government accountability. By bringing the public into the agency decision-making process, NEPA is like no other statute and is an extraordinary tribute to the ability of the American people to build upon shared values \* \* \*"

``[NEPA] gives greater voice to communities. It provides the federal government an opportunity for collaborative decision-making with state and local government and the public \* \* \* It should and in many cases does improve federal decision-making \* \* \*

``As directed by NEPA, CEQ is responsible for overseeing implementation of the environmental impact assessment process \* \* \*"

Either NEPA is an important statute worthy of implementation, as CEQ Chair McGinty states, or it is not. Either public, state, and local involvement is important, as CEQ Chair McGinty states, or it is not. Apparently, in the case of the Utah Monument designation, it was not important enough to implement NEPA because the end apparently justified the means.

What was important was selective application of NEPA for the convenience of the Clinton-Gore re-relection effort. One of two conclusions exist as to why NEPA was not applied to the Utah Monument designation as it would ``ordinarily" be applied (the words used by Ms. McCinty). The first possible conclusion is that the Utah Monument designation would not pass muster under NEPA. The second possible conclusion is that NEPA would not allow a decision before the 1996 Presidential election, and the designation was needed for the campaign. Otherwise, why not allow NEPA to ``bless" Utah Monument?

Further, it is obvious from the documents that the Administration, in its zeal to use the Antiquities Act in

an attempt to shield the Utah land grab from APA and NEPA, did not fully comply with the statutory requirements to justify using the Antiquities Act--namely that the President initiate the designation process. Ms. McGinty clarifies this point in a July 29, 1996, e-mail to Todd Stern of CEQ: "the president will do the utah event on aug 17. however, we still need to get the letter (from the President to Interior Secretary Bruce Babbitt) signed asap. the reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secretary to look into these lands to see if they are of important scientific, cultural, or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act. presidential actions under this act have always been challenged, they have never been struck down, however, so, letter needs to be signed asap so that secy has what looks like a credible amount of time to do his investigation of the matter, we have opened the letter with a sentence that gives us some more room by making it clear that the president and babbitt had discussed this some time ago."

This e-mail clarifies the following points: (1) by July 29, 1996, not only had the decision to make the designation been made by the White House, the staff had already agreed to an announcement event (the date was eventually postponed) and (2) although this decision had already been made, a fake paper trail had to be carefully crafted to make it appear as if President had asked the Secretary to look into the matter and initiate the staff work. By that time, however, the staff work was already apparently underway. This is an alarming breach of responsibility at the top levels of DOI and CEQ.

In fact, CEQ's Tom Jensen, in a frantic July 23, 1996, e-mail, asks fellow CEQ staffer Peter Umhofer to help create the fake paper trail: "Peter, I need your help. The following text needs to be transformed into a signed POTUS (President of the United States) letter ASAP. The letter does not need to be sent, it could be held in an appropriate office (Katie's [McGinty's] Todd Sterns?) but it must be prepared and signed ASAP. You should discuss the processing of the letter with Katie, given its sensitivity."

The e-mail spells out the CEQ plan to create the letter to the Secretary and store it in its own White House files—never even really sending it to the Secretary--creating the false appearance that the President's letter had predated and prompted the staff work on Escalante. All the while, work on the monument designation was already underway within DOI to draw the necessary Antiquities Act papers to make the secretly planned designation. Without such a letter, the White House would have had to comply with NEPA just like the rest of America.

### CAMPAIGN STYLE ''EVENT'' FOR A CAMPAIGN-MOTIVATED DECISION THAT VIOLATES THE INTENT OF THE ANTIQUITIES ACT

The documents show that the White House abused it discretion in nearly every stage of the process of designating the Grand Staircase-Escalante National Monument. It was a staff-driven effort, first to short-circuit a Congressional wilderness proposal, and then to help the Clinton-Core re-election campaign. The lands to be set aside, by the staff's own descriptions, were not threatened—and hence did not qualify for protection as a National Monument.

The decision was withheld from any public scrutiny or Congressional oversight—and Members of the Utah Congressional delegation were deceived as to its impending status until well after the decision had been made, and the campaign-style announcement event was only days away. The administrative and environmental hurdles that would normally accompany such an action were evaded by contorting a turn-of-the-century statute designed to protect Indian artifacts onto a 1.7-million-acre land grab. And finally, to justify use of this Act, and evasion of the requirements of NEPA—the CEQ's own enabling statute—the administrative record was toyed with to create the false impression that the President had requested the

staff work before it had been conducted.

Indeed, a careful review of the Act and historic Presidential use of the Antiquities Act clarifies that the President's use of the Act was an abuse of discretion. The Antiquities Act of 1906 is an obscure Act that pre-dated the regulatory reforms that require public notice, analysis of environmental and economic impacts, and an opportunity for interested parties to be heard. Until Clinton used it in the 1996 Utah land grab, the Act had languished unused for nearly two decades.

The Act is designed to help protect architecturally and anthropologically unique artifacts from acquisition or destruction. It has primarily been used to protect antique artifacts, historic buildings, and relatively small parcels of rare geologic formations. It was emphatically not designed to be used to set aside massive chunks of western states. When the Act was created by Congress, the West was still being settled. Congress wanted to prevent valuable historic and geologic artifacts from being destroyed or carried off. The Act was necessary, according to the 1906 bill report, ''in view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums and colleges, etc." Nowhere was a 1.7-million-acre land grab mentioned or contemplated. Nowhere in the subpoenaed documents obtained were there serious allegations of the 1.7 million acres being ''threatened" in any way.

Indeed, the House debate over the bill records that, even nearly a century ago, western Members were concerned that the powers of this Act not be used to grab up huge quantities of land. One such Member, Mr. Stephens of Texas, only agreed not to object to consideration of the bill after being assured by the bill's proponent, Mr. Lacey, that such an outcome was not possible under the act, whose major focus was Indian artifacts:

Mr. LACEY. There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to preserve them.

Mr. STEPHENS of Texas. Will that take this land off of market, or can they still be settled on as part of the public domain?

Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.

Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of this bill?

Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necesstry [sic] for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest in the Southwest, whilst the other reserves the forests and the water courses.

Mr. STEPHENS of Texas. I will say that that bill was abused. I know of one place where in 5 miles square you could not get a cord of wood, and they call it a forest, and by such means they have locked up a very large area in this country.

Mr. LACEY. The next bill I desire to call up is a bill . . . which permits the opening up of specified tracts of

agricultural lands where they can be used, by which the very evil that my friend is protesting against can be remedied. . . .

Mr. STEPHENS of Texas. I hope the gentleman will succeed in passing that bill, and this bill will not result in locking up other lands. I have no objection to its consideration.— (40 Cong. Rec. H7888, June 5, 1906.) So why take an old, obscure law designed to protect cliff dwellings or historic relics and manipulate it into a 1.7- million-acre land grab? The answer is clear from the attached documents: the ends (the political gain amongst environmental groups) justified the means (violating the purpose and intent of the Antiquities Act and NEPA to lock up the land).

The Clinton-Gore Administration's abuse of the Antiquities Act meant (1) it was not necessary to work with Congress and elected leaders from Utah; (2) it was not necessary to comply with the Administrative Procedures Act's requirements to provide public notice or opportunity to be heard; and (3) it was not necessary to comply NEPA's requirements of establishing an administrative record on environmental impacts.

The early e-mail traffic indicated a concern with establishing a paper trail from the President to the Secretary. As early as March 21, 1996, e-mail traffic between Linda Lance (Office of the Vice President) and Kathleen McGinty and others comment on several drafts of a letter that was to come from the President to Secretary Babbit requesting information on lands in Utah eligible for monument designation. Solicitor Leshy was informed of the importance of past practice on this important legal point. "As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his recommendations. Here are my questions: . .

5. If the President signs a proclamation, and a lawsuit is then brought challenging lack of Secretarial NEPA compliance, could a court set aside the proclamation; i.e. what is the appropriate relief? Please give me your . . reactions by return e-mail, and keep this close."—(April 24, 1996, e-mail from Sam Kalen to John Leshy and others.)

Even earlier, on March 20, 1996, Kathleen McGinty evinced concern that the paper trail needed to be created as quickly as possible to justify Interior's actions under the Antiquities Act: "attached is a letter to Babbitt as we discussed yesterday that makes clear that the Utah monument action is one generated by the executive office of the president, not the agency. . . . ideally it should go tomorrow."--(March 20, 1996, e-mail from Kathleen McGinty to Tom Jensen)

The lack of a Presidential letter making the request is critical. The NEPA requirements for notice, comment, and public process safeguards would ordinarily apply to a major federal action designating lands that were initiated outside of the Antiquities Act process. CEQ staff apparently knew this approximately six months before the actual decision that a record needed to be established with a request from the President to Secretary Babbitt. Time was of the essence, at least in the early part of 1996, before legislative activity on the Utah wilderness bill ended.

The record is clear that from start to finish, this was an abuse of Presidential discretion, designed to gain political advantage at the expense of the people of Utah--all the while keeping the decision behind closed doors for as long as possible.

HIGHLIGHTS OF SELECT UTAH MONUMENT RECORDS: A GLIMPSE OF THE ABUSE OF TRUST AND DISCRETION

As early as August 3, 1995, the Department of the Interior discussed the use of the Antiquities Act to withdraw land for the Utah Monument. In a memo to "Raynor" and "Baum," from "Dave' (all within the DOI Studying lands for national monument status. He noted that: "To the extent the Secretary [of the Interior] proposes a national monument, NEPA applies. However, monuments proposed by the president do not require NEPA compliance because NEPA does not cover presidential actions. To the extent that the president directs that a proclamation be drafted and an area withdrawn as a monument, he may direct the Secretary of the Interior to be part of the president's staff and to undertake and complete all the administrative support. This Interior work falls under the presidential umbrella."

This realization--that the administrative record must make it look like the idea came from the President, and not from an agency, in order to avoid NEPA compliance--is a dominant theme manifested throughout the documents. The idea was to create the false impression that this was an idea that came from the President, instead of from the Department of the Interior.

In a March 19, 1996, e-mail from Linda Lance (CEQ director for Land Management) to Tom Jensen (CEQ) and other CEQ staff, Ms. Lance states: "attached is a letter to Babbitt as we discussed yesterday that makes clear that the Utah monument action is one generated by the executive office of the president, not the agency."

This letter was never signed until August 7, 1996, and indeed may never been have been sent. (3) This is significant because it demonstrates an effort--beginning with DOI in 1995--to construct an Antiquities Act rationale to circumvent NEPA. All the while, meetings and work on the monument designation are proceeding within and between DOI, CEQ, and Department of Justice.

A draft letter from Kathleen McGinty on behalf of the President to Babbitt also makes it very clear that one early motivation behind the monument idea was to circumvent Congress's authority over wilderness designations, and specifically to control the Utah wilderness debate. The draft says: "As you know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas. . . . Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the Administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that could be made unsuitable for future wilderness designation if opened for development by Congress. . . . The President particularly seeks your advice on the suitability of such lands for designation as national monuments under the Antiquities Act of 1906." (March 19, 1996 e-mail from Linda Lance (CEQ director for Land Management) to Tom Jensen (CEQ) and other CEQ staff.)

This blatant disregard for Congressional authority over public lands is further evidence that staff was attempting to construct a path around NEPA and Congress.

On March 21, 1996, Linda Lance wrote another e-mail message to Kathleen McGinty responding to comments Ms. McGinty had made about the draft letter. She commented: "I completely agree that this can't be pitched as our answer to their Utah bill. But I'm having trouble deciding where we go from here. If we de-link from Utah but limit our request for info to Utah, why? If we instead request info on all sites that might be covered by the antiquities act, we probably get much more than we're probably ready to act on, including some that might be more compelling than the Utah parks? Am I missing something or lacking in creativity? Is there another Utah hook? Whatdya think?"

This communication makes two things clear. First, in addition to helping the Clinton-Gore campaign, the purpose of the monument was to circumvent Congressional control over Utah lands. This was a direct response to proposed Utah wilderness legislation. Second, CEQ staff concluded that they had to come up

with a facade, "another Utah hook", so their real motivations weren't exposed.

This e-mail message evinces CEQ knowledge that other lands were much better suited to monument designation. In fact, the next day--March 22, 1996--Linda Lance sent another e-mail to TJ Glauthier at OMB and Kathleen McGinty at CEQ that expounded on this problem. She stated that the real problem with drafting a request letter that singled out Utah lands was: "the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation."

She concluded the e-mail message by prophetically questioning whether: "the bad guys [will] . . . have the chance to suggest that this administration could use this authority all the time all over the country, and start to argue that the discretion is too broad?"

It is interesting to note that the Administration staff foresaw the kind of uproar the Utah Monument would cause. Ms. Lance recognized first, that people would see this as a blatant abuse of Presidential authority, and second that there may be cause to narrow the President's discretion under the Act. This process is currently underway with the successful passage in the House of the National Monument Fairness Act of 1997. Other amendments to the Antiquities Act and NEPA are currently under consideration by Members of the House Committee on Resources.

On March 25, 1996, Kathleen McGinty stated that she agreed with these doubts about the Utah Monument. In fact she was so convinced that the lands in question weren't in any real danger that she was ready to drop the whole project. She noted in an e-mail message to TJ Glauthier at OMB and Linda Lance at CEQ that: "I'm increasingly of the view that we should just drop these utah ideas, we do not really know how the enviros will react and I do think there is a danger of "abuse" of the withdraw/antiquities authorities especially because these lands are not really endangered."

A March 27, 1996, e-mail from Linda Lace at CEQ to Robert Vandermark at CEQ shows that DOI was trying to push the monument designation despite the lack of endangered lands. Lance stated: "since i and i think others were persuaded at yesterday's meeting w/ interior that we shouldn't write off the canyonlands and arches monuments just yet, here's another try at a draft letter to Babbit to get this process started."

It is clear the DOI was still advocating the monument despite the fact that CEQ was ready to drop the project. Even the DOI Solicitor's Office concluded that case law requires full compliance with NEPA's requirements when national monument proposals come out of DOI. At this point the monument idea had been tailored to respond to the Utah wilderness bills in Congress. The areas in question were centered around Arches National Park and Canyonlands National Park—areas that were in no danger of losing protection. At this point no mention had been made about the Kaiparowits Plateau or saving the West from Andalex Coal mining.

The Kaiparowits Plateau was first mentioned by Tom Jensen at CEQ in an e-mail to Linda Lance, T. Glauthier (OMB) and Kathleen McGinty on March 27, 1996. He states that in the latest version of the proposed Clinton letter to Babbitt, he had added a reference to Glen Canyon National Recreation Area "because KM [probably Kathleen McGinty] and others may want to rope in the Kaiparowits and Escalante Canyons regions if this package ultimately doesn't seem adequate to the President's overall purpose."

By ``rop[ing] in the Kaiparowits," the Administration would effectively quash the Andalex Coal Mine—in spite of the fact that the NEPA process (already under way) was incomplete for the mine. Until that process was completed, it would be impossible to know whether the mine would have any negative impact on the environment. Unconcerned with the ultimate conclusion of these environmental impact studied, the Administration wanted Kaiparowits included so they could claim that there were some ``endangered" lands

to be "protected" by the monument.

It is worth noting that the Chairman and Subcommittee Chairman has requested the draft Andalex Coal mine EIS five times since March 1997 for purposes of committee oversight and legislative needs, but the Secretary has failed to provide the record as requested.

By April 1996, DOI was starting to get frantic about the idea that they were in violation of NEPA by continuing to go forward on the national monument idea without prior Presidential direction. In an April 25, 1996 e-mail, Sam Kalen of the DOI Solicitor's office noted this concern to Solicitor John Leshy and colleagues Dave Watts and Robert Baum: "As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his recommendations."

As late as July 23, 1996, CEQ was still trying to get Bill Clinton to sign a letter to send to Babbitt. In an e-mail from Tom Jensen (CEQ) to Peter Umhofer at the White House, Mr. Jensen begged: "I need your help. The following needs to be transformed into a signed POTUS letter ASAP. The letter does not need to be sent, it could be held in an appropriate office . . . but it must be prepared and signed ASAP."

On July 25, 1996, Kathleen McGinty sent a memo to the President with an attached, suggested letter to Babbitt. This is also the first time, as far as we can tell from the documents, that CEQ mentions the Andalex coal mine as an excuse for the national monument.

By this time it is obvious that Interior had been working on the Utah Monument for quite some time. In fact,, three days later, on July 26, 1996, John Leshy sent a letter to University of Colorado law professor Charles Wilkinson asking him to draw up the actual proclamation. Included with the letter was a package of materials that Interior had put together on their monument proposal. Note that at this same time CEQ was still frantically trying to get the President to agree to send Babbitt a request to start looking at the lands in question. However, the DOI work was already underway. In this case, things were being done in exactly the reverse order.

On July 29, 1996, Kathleen McGinty sent an e-mail to Todd Stern at the White House pleading for the President to sign something. She noted that the ``letter needs to be signed asap so that [the] secy has what looks like a credible amount of time to do his investigation of the matter."

The President finally signed the letter authorizing DOI to begin its work on August 7, 1996, but it seems that the final decision to create a Grand Staircase-Escalante National Monument had already been made-by someone--on or before July 29, 1996, as evidenced by the July 29 e-mail from Kathleen McGinty to Todd Stern: ``The President will do the Utah event on Aug 17."

The documents show, however, that for some reason, the White House decided not to go ahead with the August 17 announcement date. On August 5, 1996, Kathleen McGinty sent a memo to Marcia Hale at the White House telling her that Leon Panetta wanted them to call several western Democrats to get their reactions to a possible monument proclamation. She noted that ''[t]he reactions to these calls, and other factors, will help determine whether the proposed action occur." She also emphasized that the whole thing should be kept secret, noting that ''any public release of the information would probably foreclose the President's option to proceed." It seems that at this point, the focus had shifted from pre-empting Congressional authority over Utah wilderness to creating a Presidential campaign event. The announcement had to be postponed until Democratic politicians could be consulted.

On August 14, 1996, Kathleen McGinty sent the President a memo outlining the possible places to have the photo-op announcement event. The three options discussed were (1) an oval office setting; (2) on the Utah

lands themselves; or (3) at Jackson Hole, Wyoming. Ms. McGinty noted that Secretary Babbitt thought that the Utah option would be the most "confrontational" or "in-your-face" event. Ms. McGinty commented that she thought that all three options sounded good to her. Since the event was designed to be an election year photo-op, the Arizona setting became the choice.

In this memo Ms. McGinty reveals the real purpose of the monument: "The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. In contrast to the Yellowstone ceremony, this would not be a "feel-good" event. You would not merely be rebuffing someone else's bad idea, you would be placing your own stamp, sending your own message. It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration."

She also underscored the potential political benefits in key western states, as confirmed by the non-Utah Democratic politicians who had been consulted: "In addition, the new monument will have particular appeal in those areas that contribute the most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Phoenix-Tucson area. This assessment squares with the positive reactions by Sen. Reid, Gov. Romer, and Rep. Richardson when asked their view on the proposal."

Finally, she added that the Administration really didn't have anything to lose, as far as votes are concerned: "Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances."

The situation was painted as a no-lose political situation. Translation: The monument designation will help solidify Clinton's electoral base--whole those who will object to the monument, as in Utah, will oppose Clinton's re-election anyway. They did not matter.

The event was postponed further. On August 23, 1996, Kathleen McGinty wrote another memo to the President begging him to act on the monument soon. She stated, "in any event, we need to decide this soon, or I fear, press leaks will decide it for us."

The leak finally occurred. In a September 6, 1996, memo from Kathleen McGinty to the President, she informed him that ``the Washington Post is going to run a story this weekend reporting that the Administration is considering a national monument designation." She also told him that ``we are working with Don Baer and others to scope out sites and dates that might work for an announcement on this issue.'

After the September 7, 1996, Washington Post article, Senator Bennett wrote to Secretary Babbitt requesting the Administration not to take such a drastic step without time for significant public input. Secretary Babbitt responded on September 13--just five days before the event announcing the Utah Monument--telling him that nothing was imminent and that no decisions had yet been made.

It is important to note that two days earlier, on September 11, 1996, Tom Kenworthy, a Washington Post reporter, had confirmed the whole story--including the date, time, and exact location of the announcement event at the Grand Canyon. In a September 11 e-mail to Brian Johnson, CEQ's press spokesman, Kenworthy confirmed he had all the information he needed: ``south rim of the grand canyon, sept 18--be there or be square." While the Utah Monument designation was being concealed from the entire Utah Congressional delegation, it had already been revealed to the Washington press. This strategy worked to the Administration's advantage by encouraging press interest in the event, while effectively eliminating the

possibility of Congress stepping in to stop the proposed action.

On September 18, 1996, President Clinton, standing on the South Rim of the Grand Canyon, with nature's splendor as his backdrop, finally got his photo-op. He told the nation that he was following in Teddy Roosevelt's footsteps, and that he was saving the environment from Dutch coal companies. It worked just like the Administration predicted. Bill Clinton locked up the environmental votes in the West and carried key western states like California, Arizona, and Nevada. Of course they lost Utah, but as Kathleen McGinty had predicted, Utahns are voters ``who, in candor, are unlikely to support the Administration under any circumstances."

In the final analysis, the Utah Monument designation was all about politics. To achieve their political ends, the Clinton-Gore Administration contorted a century-old statute and evaded the environmental requirements they foist on others. The Administration took pains to see that no one knew about this decision until the last minute, even to the point of deceiving the entire Utah Congressional delegation--all so they could get a political photo-op out of the monument proclamation, and preclude any Congressional action that might stop the event. It comes as no surprise the announcement event was finally held not in Utah, but across the Grand Canyon in more hospitable Arizona. This was an abuse of discretion under the Antiquities Act and a violation of NEPA by the Clinton-Gore Administration.

### ADMINISTRATION E-MAILS

August 3, 1995. To: Raynor Baum. Re: Antiquities Act

Attached are some sample Pres proclamations. Some just designate the monument, other designate and withdraw the monument. It would follow that anwr could be designated—a prestige issue—without a further withdrawal of land.

We should meet. I think we have enough materials for a meeting with John. He was not looking for a paper, but rather a brief talk about the choices and legal risks.

Dave.

### Presidential Proclamations

- 1. The Antiquities Act of 1906 provides: "The President . . . is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government . . . to be national monuments, and may reserve as part thereof parcels of lands, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. 16 U.S.C. Sec. 431."
- 2. History: "Many areas of the National Park System were originally established as national monuments under this act and placed under the care of the Department of the Interior to be administered by the National Park Service under the Service's Organic Act of 1916. 16 U.S.C. Sec. 1. The most recent proclamations were signed by President Carter and established various Alaska monuments, the predecessors to the national parks and preserves eventually established by the Alaska National Interest Lands Conservation Act."
- 3. Analysis: When the president undertakes the preparation of a proclamation, the restrictions of the law must be carefully observed and documented. The lands must be federally owned or controlled. Private and state lands are excluded. The area must be the smallest area compatible with management of the objects. Although broad discretion is vested in the president, the administrative record must reflect the rationale basis for the acreage. Most areas of the National Park System were established because of objects of historic or scientific interest. Again, an administrative record must be established regarding the objects to be protected and their significance properly demonstrated.
- 4. Other Laws: The Federal Land Policy and Management Act, 43 U.S.C. Sec. 1701, does not preclude or restrain

presidential proclamations, even though it has restrictions on other forms of public land withdrawals of areas over 5,000 acres. See 43 U.S.C. Sec. 1714(c)(1).

To the extent the Secretary proposes a national monument, NEPA applies. However, monuments proposed by the president do not require NEPA compliance because NEPA does not cover presidential actions. To the extent that the president directs that a proclamation be drafted and an area withdrawn as a monument, he may direct the Secretary of the Interior to be part of the president's staff and to undertake and complete all the administrative support. This Interior work falls under the presidential umbrella.

5. Litigation: "I have attached the most recent case involving the Alaska monuments. The case is instructive and should be read, understood and followed. Careful observance of the administrative and institutional structures as well as a focused administrative record will enhance success in the court house."

Record Type: Federal (all-in-1 mail). Creator: Kathleen A. McGinty (McGinty, K.) (CEQ). Creation Date/Time: 20-MAR-1996 08:01:40.12. Subject: Utah letter to Babbitt. To: Thomas C. Jensen.
Text: "I don't have this document. But, I want to see it personally and clear off on it." thx.

#### attachment 1

Att Creation Time/Date: 19-MAR-1996 19:02:00.00. Att Cordation Time/Date: 19-MAR-1996 19:02:00.00.
Att Bodypart Type: E.
Att Creator: CN=Linda L. Lance/O=OVP.
Att Subject: Letter to Babbit re monuments.
Att To: McGinty, K; Glauthier, T; Jensen, T; Bear, D; Fidler, S; Crutchfiel, J; Shuffield, A.
Text: "Message Creation Date was at 19-MAR-1996 19:02:00"

Attached is a letter to Babbit as we discussed yesterday that makes clear that the Utah monument action is one generated by the Executive Office of the President, not the agency. Craig drafted and I edited.

It seems to me it could go from Katie and/or TJ rather than having to go through the clearance process for the pres. signature since time is a concern, but Dinah should sign off on that, and it could be done either way.

Also, do we know whether the canyonlands and arches areas we're considering would be affected by the Utah wilderness bill--see my question in bold on the attachment.

Katie and TJ, you should agree on how to sign this, and then one of your offices can just finalize and sent it out. Ideally it should go tomorrow. If you want to discuss, just yell.

### attachment 2

Att Creation Time/Date: 19-MAR-1996 19:01:00.00. Att Bodypart Type: D. Text:

"The following attachments were included with this message".

### attachment 3

Att Creation Time/Date: 19-MAR-1996 19:01:00.00. Att Bodypart Type: P. Att Subject: Parksltr.

Text: "Dear Secretary Babbitt,

The President has asked that we contact you to request information within the expertise of your agency. As you

know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas. Protection of these lands is one of the highest environmental priorities of the Clinton Administration.

Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that could be made unsuitable for future wilderness designation if opened for development by Congress. [Do the canyonlands and arches areas fit this description? Are they threatened by the Utah wilderness bill? Is there a better way to describe the relevant lands?] The President particularly seeks your advice on the suitability of such lands for designation as national monuments under the Antiquities Act of 1906.

The President wishes to act to protect these lands as expeditiously as possible, particularly given the threat from pending congressional action. Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate action, please provide that information separately and as soon as possible. Thank you for your assistance.

Katie and/or TJ.

Record Type: Federal (ALL 1-1 MAIL). Creator: Thomas C. Jensen (JENSEN, T) (CEQ). Creation Date/Time: 20-MAR-1996 08:26:53.99 Subject: Linda's park letter to babbitt. To: Thomas C. Jensen. Read: 20-MAR-1996 08:27:08.41. To: Kathleen A. McGinty. Text: Dear Secretary Babbitt,

The President has asked that we contact you to request information within the expertise of your agency. As you know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas. Protection of these lands is one of the highest environmental priorities of the Clinton Administration.

Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the Administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that could be made unsuitable for future wilderness designation if opened for development by Congress. [do the canyonlands and arches areas fit this description? are they threatened by the utah wilderness bill? is there a better way to describe the relevant lands?] The President particularly seeks your advice on the suitability of such lands for designation as national monuments under the Antiquities Act of 1906.

The President wishes to act to protect these lands as expeditiously as possible, particularly given the threat from pending congressional action. Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate action, please provide that information separately and as soon as possible.

Thank you for your assistance

Katie and/or TJ.

Record Type: Federal (EXTE. L MAIL).
Creator: CN=Linda L. Lance.
Creation Date/Time: 21-MAR-1996 18:36:00.00.
Subject: Re: KM's comments on yesterday's monument letter.
To: McGinty, K; jensen, t, :bear, d; :crutchfiel, j; :glauthier, t.
TEXT: Message Creation Date was at 21-MAR-1996 18:40:00.

I completely agree that this can't be pitched as our answer to their utah bill, but i'm having trouble deciding where we go from here, if we delink from utah but limit our request for info to utah, why? if we instead request info on all sites that might be covered by the antiquities act, we probably get much more than we're probably ready to act on,

including some that might be more compelling than the utah parks? am i missing something or lacking in creativity? is there another utah hook? whatdya think?

I'm getting concerned that if we're going to do this we need to get this letter going tomorrow. almost everything else is pretty much ready to go to the president for decision, although some drafting of the formal documents like pres. memos still needs to be done.

Thanks for you help.

Record Type: Federal (External Mail).
Creator: CN=Linda L. Lance.
Creation Date/Time: 22-Mar-1996 18:56:00.00.
Subject: redraft of president's babbitt letter and question.
To: Glauthier, T; McGinty, K; Jensen, T; Bear, D; Crutchfiel, J; Beard, B.
Text: Message Creation Date was at 22-Mar-1996 19:00:00.

Attached is a minimalist approach to the letter to Babbitt. Contrary to what justice may have suggested, I think it's important that he limit the inquiry to lands covered by the antiquities act, since that's the area in which he can act unilaterally. To make a broader request risks scaring people, and/or promising followup we can't deliver.

I realized the real remaining question is not so much what this letter says, but the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation. Presidents have not used their monument designation authority in this way in the past—only for large dramatic parcels that are threatened. Do we risk a backlash from the bad guys if we do these—do they have the chance to suggest that this administration could use this authority all the time all over the country, and start to argue that the discretion is too broad?

I'd like to get your view, and political affairs, on this. Maybe I'm overreacting, but I think we need to consider that issue.

### attachment 1

Att Creation Time/Date: 22-Mar-1996 18:59:00.00.
Att Bodypart Type: D.
Text: The following attachments were included with this message.

### attachment 2

Att Creation Time/Date: 22-Mar-1996 18:59:00.00. Att Bodypart Type: p. Att Subject: Parkpres. Text: Dear Secretary Babbitt.

It has come to my attention that there may be public lands in Utah that contain significant historic or scientific areas that may be appropriate for National Monument status under the Antiquities Act of 1906. Therefore, I am requesting any information available to your Department on Utah lands owned or controlled by the United States that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest.

Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

WJC.

Record Type: Federal (External Mail)

Creator: McGinty Creation Date/Time: 25-MAR-1996 13:21:00.00.

Subject: Re: redraft of president's Babbitt letter and question
To: T. J. Glauthier; Linda L. Lance; Jensen T.; Beard, D.; Crutchfield, J.; Beard, B.

Text: I'm increasingly of the view that we should just drop these Utah ideas. We do not really know how the enviros will react and I do think there is a danger of ``abuse" of the withdraw/antiquities authorities especially because these lands are not really endangered.

Record Type: Federal (All-in-1 Mail) Creator: Thomas C. Jensen (JensenXT) (CEQ) Creation Date/Time: 25-MAR-1996 13:29:44.93.

Subject: Potus letter re-do
To: Linda L. Lance; T. J. Glauthier; James Craig Crutchfield; Bruce D. Beard; Dinah Bear; Kathleen A. McGinty.

Text: Attached is my re-do of the draft potus letter to Babbitt. I've added the reference to Glen Canyon NRA for two reasons: first, because some the lands we're reviewing next to Canyonlands are more proximate to GCNRA. Second, because KM and others may want to rope in the Kaiparowits and Escalante Canyons regions (which are adjacent to GCNRA) if this package ultimately doesn't seem adequate to the President's overall purpose. Call if you've got any questions.

You're doing a great job.

Tom.

#### ATTACHMENT 1

Att Creation Time/Date: 25-MAR-1996 13:25:00.00. Att Bodypart Type: p. Att Creator: Thomas C. Jensen. Text: Dear Secretary Babbitt,

It has come to my attention that there may be public lands adjacent to Glen Canyon National Recreation Area, Canyonlands National Park and Arches National Park in Utah that contain significant historic or scientific areas that may be appropriate for protection through National Monument status under the Antiquities Act of 1906. Therefore, I am requesting any information available to your Department on lands owned or controlled by the United States adjacent to Glen Canyon National Recreation Area, Canyonlands National Park or Arches National Park that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest. Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

WJC.

Record Type: Federal (All-in-1 mail). Creator: Kathleen A. McGinty (McGinty K) (CEQ). Creation date/time: 27 Mar 1996 15:49:36.19. Subject: pls discuss this with tom. To: Robert C. Vandermark

Text: Rob, I want to see this letter and comment. pls coordinate with tom so we send one set of comments back to

#### Attachment 1

ATT bodypart Type: E ATT: Creator: CN+Linda L. Lance/O+OVP ATT Subject: another babbitt letter draft To: McGinty, K; Jensen, T+Bear, D; Crutchfield, J; Beard B; Glauther T Text: Message Creation Date was at 27 Mar 1996 12:40:00.

since i and i think others were persuaded at yesterday's meeting w/ interior that we shouldn't write off the canyonlands and arches monuments just yet, here's another try at a draft letter to babbit to get this process started. If this looks ok, i'd like to run it by justice before it goes out.

tj was going to try to get offices together to discuss the monuments issue, and we need to do that, but since we're now looking at 4/9 as a possible announcement date, i'd propose getting this letter agreed on and getting a decision memo to the president just on sending the letter to interior, even if we don't ultimately do the monument, it won't hurt to have this letter go out and have interior formally return info to us. we'll never have this ready by 4/9 if a letter doesn't go soon, according to justice, the info justice has seen so far isn't an adequate admin record, so interior will have some work to do.

i'll try to draft a short decision memo to the president on sending this letter (for tj and katie's signature??) so that you all can look at it today. let me know if you have problems w/ this approach, or comments on the letter.

#### attachment 2

ATT Creation time/date: 27 Mar 1996 12:41:00.00 ATT Bodypart Type D Text: The following attachments were included with this message:

### attachment 3

ATT Creation time/date 27 Mar 1996 12:41:00.00 ATT Bodypart Type: p ATT Subject: Parkpres Text: Dear Secretary Babbitt,

It has come to my attention that there may be public lands adjacent to Canyonlands and Arches National Parks in Utah that contain significant historic or scientific areas that may be appropriate for protection through National Monument status under the Antiquities Act of 1906. Therefore, I am requesting any information available to your Department on lands owned or controlled by the United States adjacent to Cayonlands or Arches National Parks that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest.

Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

WJC.

Record Type: Federal (External mail).
Creator: CN=Linda L. Lance.
Creation date/time: 29-MAR-1996 19:00:00.00.
Subject: Monday meeting winterior and question.
To: Jensen T; McGinty K; Galauthier T
Text: Message Creation Date was at 29-MAR-1996 19:01:00.

Tom and I agreed that the fastest way to come to closure on remaining monument/Utah issues is for he and I to go to Interior on Monday to meet with Anne Shield, NPS folks, and solicitors office. Anne has agreed to schedule something for 2 p.m. Monday in the secretary's conference room. Tom I really hope that works for you, or that you can rearrange to attend. If not, let me know what will work for you on Monday p.m.

If Katle or TJ want to attend and it helps to move it here, we can do that, but I think we need to get with them soon. We'll push them on new wilderness inventory and Kaparowitz/ Escalante.

The question I have for you guys is why does Anne react so negatively to the idea of having George Frampton there? I told her I'd left a message for him in Colorado, and thought he should be at the meeting, and she gave me a lecture about how he wouldn't have the necessary info, hadn't been involved, she had no idea when he'd be back in D.C., we need to have Destry there, etc.

Is there a reason for me to insist on scheduling this when Frampton can be there? Does he have a perspective on this that they don't? Is there some friction between him and the NPS folks that have been involved? Let me know. Thanks

COUNCIL ON ENVIRONMENTAL QUALITY, WASHINGTON DC, MARCH 29, 1996. MEMORANDUM FOR THE PRESIDENT FROM: KATHLEEN A. MCGINTY RE: ATTACHED LETTER TO SECRETARY BABBITT FOR YOUR SIGNATURE

#### I. ACTION-FORCING EVENT

As you know, we are putting together a package of national park protection actions for your consideration that, if you approve, may be announced at an event on April 9. As part of that initiative, and in response to the threat to Utah wilderness lands that was posed by the recently-defeated Republican parks bill, we have been reviewing Utah public lands to ensure that we are doing everything possible to provide appropriate protection to those lands. We have focused particularly on public lands that contain historic or scientific resources or are threatened by development.

It has come to my attention that there may be federally- owned lands adjacent to Glen Canyon National Recreation Area, Canyonlands National Park and Arches National Park in Utah that may warrant protection as national monuments. Statutory authority to issue a proclamation declaring public lands to be national monuments is available only to the President, who cannot delegate such authority.

Case law interpreting this authority has further held that the President can request information from his advisors on the suitability of certain lands for such designation, but that the action must be initiated by the President, not an advisor. For that reason, it is necessary that you formally request Secretary Babbit to provide you with such information before we can obtain the necessary background to consider such designation on the merits. We need to do that as soon as possible so that this designation can be completed in time for a possible April 9 announcement. The attached letter makes that request.

### II. BACKGROUND ANALYSIS

The Antiquities Act of 1906 provides the President with discretionary authority to declare by public proclamation objects of historic or scientific interest that are on lands owned or controlled by the Government to be national monuments. Only an Act of Congress can disestablish a monument.

Reservation as a national monument generally offers protection to the area comparable to that of a National Park, including closure to future mineral leasing claims. The agency managing the monument can grandfather existing uses of the land, such as grazing permits.

No final decision about the designation of Utah lands as national monuments can be made without additional material from the Department of Interior. However, currently available information indicates that significant Bureau of Land Management acreage adjacent to each of the areas addressed in the letter contains historic and scientific objects of importance, including numerous archaeological sites, Indian rock art, geological formations and wildlife habitat.

### III. RECOMMENDATION

I recommend that you sign the attached letter requesting information on Utah lands from Secretary Babbitt

### IV. DECISION

- --Approve --Approve as amended --Reject
- --No action.

The White House, Washington, March 29, 1996.

Hon. Bruce Babbitt, Secretary of the Interior, Washington, D.C.

It has come to my attention that there may be public lands adjacent to Glen Canyon National Recreation Area, Canyonlands National Park and Arches National Park in Ulah that contain significant historic or scientific areas that may be appropriate for protection through National Monument status under the Antiquities Act of 1906. Therefore, I am requesting any information available to your Department on lands owned or controlled by the United States adjacent to Glen Canyon National Recreation Area, Canyonlands National Park or Arches National Park that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest.

Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

Sincerely.

Bill Clinton.

Record type: Federal (All-in-1 IL). Creator: Kathleen A. McGinty (MCGINTY--K) (CEQ). Creation date/time: 3-APR-1996 18:04:45.13. To: Linda L. Lance
To: Linda C. Jensen
To: Lisa Guide

Text: For the meeting tomorrow at 3, I believe we need a short summary (1-2 pp) of all of the parts of the package. Thx. I see this as a major decision-making meeting. On the Utah pieces; on the overall package; on potus involvement. By the way Leshy said to me today that he thought there was no way they could get info on Kaipairowitz (sp?) and that Escalante was a maybe.

Record Type: Federal (All in-1 Mail).
Creator: James Craig Crutchfield (Crutchfield J) (OMB).
Creation date/time: 3-Apr-1996 10:09:39.50.
Subject: Parks Initiative update.
To: T.J. Glauthier; Ron Cogswell; Bruce D. Beard; Marvis G. Olfus; Linda L. Lance; Thomas C. Jensen.

Text: According to Linda Lance, the Parks Initiative is not currently on the President's schedule and no event is likely before the President's mid-April international trip. May/June is a more realistic timeframe. Interior may not be happy about this, but they created a false urgency by citing a pending Gingrich parks proposal. (It now appears that the only imminent Republican proposal is the Senate Omnibus lands bill, which is on hold because of Utah wilderness.)

### Other key points:

Sufficiently Presidential? Linda and Tom Jensen met on Monday with Interior to address skepticism from the West Wing about whether the Initiative is worthy of a Presidential event. (Ann Shields grumbled that it would be Presidential if it retained the tax proposals.) They discussed three new candidates for National Monument designation in Utah (Kiparowitz, Grand Gulch, and Escalante), each with pros and cons, and Interior agreed to review these options further. Interior/INPS complained that their park proposal was morphing into a Utah proposal, but Tom and Linda dismiss this complaint.

POTUS letter to Babbitt was sent up for signature on Friday (3/31), but no word from W.H. Clerk on whether it was signed. By requesting Babbitt to provide information on lands in Utah for possible designation as National Monuments, this letter would establish the needed Administrative record to defend use of the Antiquities Act. The final letter was revised to reference other public lands around Glen Canyon NRA, leaving open the possibility for adding the sites noted above.

From: Sam Kalen 4/25/96 11:42AM To: John Leshy, Dave Watts, Robert Baum. cc: Edward Cohen. Subject: Re: Antiquities Act.

As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his recommendations. Here are my questions:

- 1. Is that right? Does it have to be in writing?
- 2. What is the optimum timing for such a letter--before we start any work?
- 3. Does the letter have to be public (is it foiable at any time)? Could the President claim executive privilege or is there some other basis for withholding the letter, at least until the Secretary forwards recommendations?
- 4. Does the letter have to be specific geographically; e.g., ``give me recommendations on use of the Act in Oregon" or ``on BLM lands in western Oregon" or is ``nationwide-- anywhere on lands managed by agencies under your jurisdiction" OK?
- 5. If the President signs a proclamation, and a lawsuit is then brought challenging lack of Secretarial NEPA compliance, could a court set aside the proclamation; i.e., what is the appropriate relief?

Please give me your off-the-top-of-the-head reactions by return e-mail, and keep this close. Thanks.

I don't know what the Dept. has recommended or written in the past, but my recollection (and I will check) is that the issue was raised in connection with Alaska v. Carter and I think the court indicated that EIS not needed when President asks for recommendation. And that case was decided well before more recent NEPA law-e.g., NAFTA case, which further suggests that Secretary's response to President would not be an "action" under NEPA; of course, one could also argue a Douglas County type analogy (status quo exception for designation of monument if NEPA even applied to Executive and thus surely status quo exception for the recommendation on such designation). Additionally, to make it even less like any action under NEPA, the President's request could be for a list of areas in a certain region that DOI already has indicated are WSAs, ACECs, etc. As for FOIA, couldn't we argue deliberative process exception until designation—with harm being that disclosure would prompt nuisance type activities in the area.

sam.

Record type: Federal (All-in-1 Mail). Creator: Thomas C. Jensen (Jensen, T) (CEQ). Creation date/time: 23-Jul-1996 15:30:42.34. Subject: Potus letter re: Utah. To: Peter G. Umhofer CC: Kathleen A. McGinty.

Text: Peter, I need your help.

The following text needs to be transformed into a singed POTUS letter ASAP. The letter does not need to be sent, it could be held in an appropriate office (Katie's? Todd Stern's?) but it must be prepared and signed ASAP.

You should discuss the processing of the letter with Katie, given its sensitivity.

Dear Secretary Babbitt, it has come to my attention that there may be public lands in the general area of Glen Canyon National Recreation Area in Utah that contain significant historic or scientific values that may be appropriate for protection through National Monument status under the Antiquities Act of 1906.

As I stated when I raised this with you in conversation some weeks ago, I would ask that you provide to me any information available to your Department on lands owned or controlled by the United States in the general area of Glen Canyon National Recreation Area in Utah that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest. Please respond as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

BC.

Record, type: Federal (all -1 Mail). Creator: Thomas C. Jensen (Jensen--T) (CEQ). Creation date/time: 25-JUL-1996 11:40:06.21. To: Peter G

Text: Peter, Here's a redraft of the POTUS cover memo regarding the POTUS letter to Babbitt on Utah. I've rewritten it to meet suggestions from Todd Stern. These changes may also address questions that Wes raised.

Tom

### Attachment 1

Att Creation time/date:25-JUL-1996 11:38:00.00 ATT Bodypart Type:p ATT Creator; Thomas C. Jensen Text: Memorandum to the president. From: Kattie McGinty, Subject: Attached letter to Secretary Babbitt.

We have prepared for your signature the attached letter to Interior Secretary Babbitt. The letter will serve as a critical piece of the administration record if, as we have discussed, you decide to designate certain lands in southern Utah as national monuments under the Antiquities Act of 1906.

The Antiquities Act provides you with executive authority to set aside federal lands as national monuments in order to protect objects of scientific or historic interest. The authority has been used numerous times in the last ninety years, and served as the basis for creation of many of the Nation's most important protected areas. Many national parks in the West, including most in Utah, were originally set aside under the Antiquities Act. For example, Grand Canyon, Grand Teton, Arches, Capital Reef, Cedar Breaks, Dinosaur, National Bridges, and Zion were originally protected by

presidential orders issued under the Antiquities Act.

The purpose of the attached letter is to request from Secretary Babbitt information on federal lands in southern Utah that are suitable for monument designation. The letter serves to engage the Secretary in his role as executive staff to you.

Ordinarily, if the Secretary were on his own initiative to send you a recommendation for establishment of a monument, he would most likely be required to comply with NEPA and certain federal land management laws in advance of submitting his recommendation. But, because he is responding to your request for information, he is not required to analyze the information or recommendations under NEPA or the other laws. And, because Presidential actions are not subject to NEPA, you are empowered to establish monuments under the Antiquities Act without NEPA review.

The text of the letter is modeled after the letter sent by President Carter to the Interior Department seeking information on lands in Alaska suitable for monument designation. Based on the department's response and recommendations, President Carter set aside approproximately 26 million acres as national monuments. The legality of the President's action was challenged by monument opponents, but was upheld by the federal courts. The letter to Interior was specifically cited by the courts as a principal basis for their finding of legality. We recommend that you sign the letter.

Washington, DC, July 25, 1996. Memorandum to the President. From: Kathleen A. McGinty. Re: Attached letter to Secretary Babbitt.

We have prepared for your signature the attached letter to Secretary of the Interior Bruce Babbitt. The letter will serve as a critical piece of the administrative record if, as we have discussed, you decide to designate certain lands in southern Utah as national monuments under the Antiquities Act of 1906.

The Antiquities Act provides you with executive authority to set aside federal lands as national monuments in order to protect objects of scientific or historic interest. The authority has been used numerous times in the last ninety years, and served as the basis for creation of many of the Nation's most important protected areas. Many national parks in the West, including most in Utlah, were originally set aside under the Antiquities Act. For example, Grand Canyon, Grand Teton, Arches, Capitol Reef, Cedar Breaks, Dinosaur, Natural Bridges, and Zion were originally protected by presidential orders issued under the Antiquities Act.

The purpose of the attached letter is to request from Secretary Babbitt information on federal lands in southern Utah that are suitable for monument designation. The lands in question represent a unique combination of archaeological, paleontological, geologic, and biologic resources in a relatively unspoiled natural ecosystem. Three general areas lying to the west of the Colorado River and to the east of Bryce Canyon National Park will be studied: the Grand Staircase, Kaiparowits Blateau, and Escalante Canyon region.

The Grand Staircase spans six major life zones, from lower Sonoran desert to Arctic-Alpine forest, and its outstanding rock formations present some four billion years of geology. The area includes numerous relict plant areas—rare examples of pristine plant ecosystems that represent the natural vegetative cover that existed in the region before domestic livestock grazing.

The Kaiparowits Plateau includes world class paleontological sites, including the best and most continuous record of Latie Cretaceous terrestrial life in the world. The area includes thousands of significant archaeological sites, including the remnants of at least three prehistoric Indian cultures. The Kaiparowits includes the most remote site in the lower 48 states.

The Escalante Canyon region, includes some of the most scenic country in the West, significant archaeological resources, unique riparian ecosystems, and numerous historic sites and trails.

These lands were at the heart of the recent legislative battle over Utah wilderness. They are, in sum, much of what the parties were fighting over. Environmentalists value the area for its astonishing beauty, remoteness, and ecological integrity. Development interests want to tap the coal resources of the Kaiparowits Plateau and, through road construction open now wild areas to commercial use.

The Kaiparowits Plateau lies in the center of the area. Two companies hold leases to mine federal coal there. One company is working with Interior to surrender its Kaiparowits leases in exchange for rights to coal elsewhere in Utah. The other lease holder, a Dutch-owned coal company with plans to ship coal to Asia, has rebuffed Interior's offers to pursue a trade. Coal development on the Kaiparowits would damage the natural, cultural, and historic values of the entire area. Monument designations would not block the proposed coal mine, per se, but would help in a variety of ways to pressure the Dutch company to surrender its leases in exchange for coal elsewhere.

Should you decide, based on the Secretary's recommendations, to designate one or more national monuments in the area, your action will be widely and vigorously supported by national environmental groups and advocates. They will be stunned and delighted by the boldness and scope of the action. There will be significant public support in those areas in which most visitors to southern Utah reside, including California, Colorado, Arizona and the Salt Lake City area. National print media strongly supported the Administration's pro-Utah wilderness stance and can be expected to support monument designations.

Utah's congressional delegation and governor will be angered by the action. CEQ is in consultation with the Counsel's office to identify measures to reduce adverse effects on matter within the control of the Senate Judiciary Committee, chaired by Senator Orrin Hatch (R-UT). Republicans are likely to characterize the action as an aspect of the so- called "War on the West."

The text of the attached letter is modeled after the letter sent by President Carter to the Department of the Interior seeking information on lands in Alaska suitable for monument designation. Based on the department's response and recommendations, President Carter set aside approximately 26 million acres as national monuments. The legality of the President's action was challenged by monument opponents, but was upheld by the federal courts. The letter to Interior was specifically cited by the courts as a principal basis for their findings of legality.

We recommend that you sign the letter seeking information and advice from Secretary Babbitt.

The White House, Washington, July 24, 1996.

Hon. Bruce Babbitt, Secretary of the Interior, Washington, DC.

Dear Bruce:

As I said in conversation with you some weeks ago, it has come to my attention that there may be public lands in the general area of Glen Canyon National Recreation Area in Utah that contain significant historic or scientific values that may be appropriate for protection through National Monument status under the Antiquities Act of 1906.

I would like for you to provide me any information available to your Department on lands owned or controlled by the United States in the general area of Glen Canyon National Recreation Area in Utah that contain historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest.

Please respond to this request as soon as possible. If there are land areas that you have already reviewed and that may be appropriate for immediate consideration, please provide that information separately and as soon as possible.

Thank you for your assistance.

Sincerely,

Record Type: Federal (All-in-1 Mail).
Creator: Kathleen A. McGinty (MCGINTY-K) (CEQ).
Creation date/time: 29-JUL-1996 09:31:39.65.
Subject: Utah letter.
To: Todd Stern.

Text: wanted to just reiterate what I said about the timeliness of the letter because I was worried that, on first

iteration, I may have confused you.

The president will do the Utah event on Aug 17. However, we still need to get the letter signed ASAP. The reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secy to look into these lands to see if they are of important scientific, cultural or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act, presidential actions under this act have always been challenged, they have never been struck down, however.

So, letter needs to be signed ASAP so that secy has what looks like a credible amount of time to do his investigation of the matter, we have opened the letter with a sentence that gives us some more room by making clear that the president and babbitt had discussed this some time ago.

Many thanks.

[Document 36]

August 5, 1996.

Memorandum to Marcia Hale. From: Kathleen A. McGinty. Re: Utah Event Calls.

Leon Panetta asked that I prepare talking point for you to use in making calls to certain western elected officials regarding the proposed Utah event.

My notes indicate that Leon wanted you to call Governor Roy Romer, Governor Bob Miller, former Governor Mike Sullivan, former Governor Ted Schwinden, Senator Harry Reid, Senator Richard Bryan, and Representative Bill Richardson to test the waters and gather their reactions.

The reactions to these calls, and other factors, will help determine whether the proposed action occur. If a final decision has been made on the event, and any public release of the information would probably foreclose the President's option to proceed.

I would be happy to speak with you about this or provide any additional information you may require. If I am unavailable, Wesley Warren and Tom Jensen of my staff are prepared to assist you.

Attachment.

August 14, 1996.

Memorandum to the President.
From: Katie McGinty.
Subject: Proposed Utah Monument Designation and Event.

### INTRODUCTION AND BACKGROUND

This memo responds to your request yesterday for additional information on the proposed event at which you would announce designation of certain BLM lands in Utah as a national monument.

In brief, the current proposal is that you should use your authority under the Antiquities Act of 1906 to establish the "Grand Staircase-Escalante National Monument," a new national monument covering approximately 1.7 million acres of federal land in Utah managed by the Interior Department's Bureau of Land Management.

At your direction, the Secretary of the Interior, in cooperation with the Department of Justice, has prepared the analyses and documents that are required to support creation of the proposed new national monument. A draft version of those materials is attached for your information. Final versions should be transmitted to the White House

today and should be ready for execution within 24 hours.

#### **OPTIONS FOR ANNOUNCEMENT**

Three alternate events have been discussed to frame announcement of your action. Some advisors believe that the announcement should take place in a formal Oval Office-type setting, so as to emphasize the presidential character of the action. This course would allow the most scheduling flexibility.

Other advisors recommend that you make the announcement on or near the lands to be covered by the monument designation. The area is very scenic and would offer great, unique visuals, but the country is rough and remote with difficult logistics. The first attached sheet of photos shows views of or from potential event sites on lands covered by the new monument designation. The landscape is sere, but strikingly beautiful. Because of good air quality, views extend beyond 100 miles. Morning and afternoon light bring out the land's colors best. August weather is hot, probably windy, with a chance of afternoon and evening thunderstorms.

The closest town with an airport capable of handling jet aircraft is Page, Arizona, a small town located on the Arizona-Utah border next to Lake Powell and Glen Canyon Dam. Travel time from the Page airport to the most likely event locations would be roughly 15 minutes by helicopter or 1 hour by four-wheel drive vehicle. The National Park Service maintains significant enforcement and other staff nearby at Glen Canyon National Recreation Area and Grand Canyon National Park and can be called upon with short notice to assist with event logistics. Based on our experience with the proposed "condor release" event (which would have occurred in the same general area), I estimate that an appropriate event could be organized with roughly 48-72 hours lead time. Secretary Babbitt notes that this option would have the most confrontational or "in-your-face" character of the three.

The third option would be to hold the event in Jackson Hole. The logistics and scheduling would be much simpler than the Utah site option and, like the Oval Office option, would not present the same confrontational aspect associated with an event in Utah. For my part, I believe that any of the three options will adequately serve the purposes underlying establishment of a new monument.

### PURPOSE OF THE UTAH EVENT

The purpose of the new monument designation would, in general, be to provide additional protection for scenic public lands with high scientific and historical value. More specifically, monument designation would grant the Interior Department additional leverage to forestall a proposed coal mine in the area.

The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. In contrast to the Yellowstone ceremony, this would not be a "feel-good" event. You would not merely be rebuffing someone else's bad idea, you would be placing your own stamp, sending your own message. It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration.

Establishment of the new monument will be popular nationally in the same way and for the same reasons that other actions to protect parks and public lands are popular. The nationwide editorial attacks on the Utah delegation's efforts to strip wilderness protection from these and other lands is a revealing recent test of public interest in Utah's wild lands. In addition, the new monument will have particular appeal in those areas that contribute most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon, and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Pheonix-Tucson area. This assessment squares with the positive reactions by Sen. Reid, Gov. Romer, and Rep. Richardson when asked their views on the proposal.

Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances. It would draw fire from interests who would characterize it as anti-mining, and heavy-handed Federal interference in the West. Gov. Miller's concern that Nevada's sagebrush rebels would not approve of the new monument is almost certainly correct, and echoes the concerns of other friends, but can be offset by the positive response in other constituencies.

THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

The Antiquities Act provides you with executive authority to set aside federal lands as national monuments in order to protect objects of scientific or historic interest. The authority has been used more than 100 times in the last ninety years, and served as the basis for creation of many of the Nation's most important protected areas. Many national parks in the West, including most in Utah, were originally set aside under the Antiquities Act. For example, Grand Canyon, Grand Teton, Arches, Capitol Reef, Cedar Breaks, Dinosaur, Natural Bridges, and Zion were originally protected by presidential orders issued under the Antiquities Act. Since World War II, every President except Presidents Nixon, Reagan, and Bush have established national monuments.

The attached memorandum from Secretary Babbitt recommends that approximately 1.7 million acres of federal land managed by the Bureau of Land Management in southern Utah be designated as the ``Grand Staircase-Escalante National Monument."

The lands in question represent a unique combination of archaeological, paleontological, geologic, and biologic resources in a relatively unspoiled natural ecosystem. Three general areas lying to the west of the Colorado River and to the east of Bryce Canyon National Park would be covered by the new monument: the Grand Staircase, Kaiparowits Plateau, and the Escalante Canyon region.

The Grand Staircase spans six major life zones, from lower Sonoran desert to Arctic-Alpine forest, and its outstanding rock formations present some four billion years of geology. The area includes numerous relict plant areas—rare examples of pristine plant ecosystems that represent the natural vegetative cover that existed in the region before domestic livestock grazing.

The Kaiparowits Plateau includes world class paleontological sites, including the best and most continuous record of Late Cretaceous terrestrial life in the world. The area includes thousands of significant archaeological sites, including the remnants of at least three prehistoric Indian cultures. The Kaiparowits includes the most remote site in the lower 46 states.

The Escalante Canyon region includes some of the most scenic country in the West, significant archaeological resources, unique riparian ecosystems, and numerous historic sites and trails.

#### **EFFECTS OF MONUMENT DESIGNATION**

There is very little current human use of the area proposed for monument designation and, with the exception of the proposed coal mine discussed below, current and anticipated uses are generally compatible with protection of the area as a monument and would not be affected.

The proposed proclamation would apply to only federal lands. Private and state-owned parcels would be excluded from the monument.

The new monument would be subject to valid existing rights, but would preclude new mining claims in the area.

The proclamation would depart from prior practice and would not reserve federal water rights. This approach on water rights reflects the judgment that an assertion of water rights would invite unnecessary controversy. Some of the objects to be protected by the monument designation do not require water. There is very little water in the area, and what water there is probably has already been claimed under state law. As a part of the study described below, the Secretary will determine whether to seek water rights.

Finally, the proclamation would direct the Secretary of the Interior to prepare a management plan for the area within three years. Although the precise outcome of the three-year planning process cannot be forecast, the Secretary believes that current uses of the area, including grazing, hunting, fishing, off-road vehicle use and similar activities would generally not be affected at current levels or in current areas of use.

The principal substantive effect of the monument designation will be on a proposed coal mine on the Kaiparowits Plateau.

The Kaiparowits Plateau lies in the center of the area that would be covered by the monument designation. Two companies hold leases to mine federal coal there. One company is working with Interior to surrender its Kaiparowits leases in exchange for rights to coal elsewhere in Utah (a situation quite similar to the case of the New World Mine). The other lease holder, Andalex Resources, a Dutch-owned coal company with plans to ship coal to Asia, has rebuffed Interior's offers to pursue a trade.

Coal development on the Kaiparowits would damage the natural values of the entire area. Monument designations would not block the proposed coal mine, per se, but would help in a variety of ways (described at length in the Secretary's attached memo, to persuade Andalex to surrender its leases in exchange for coal elsewhere.

This step--reducing or eliminating the risk of coal mining on the Kaiparowits--would represent an immense victory in the eyes of environmental groups and, based on the editorial written on the subject during the Utah wilderness bill debate, would be widely halled in the media.

Washington, DC, August 14, 1996.
Memorandum for the President.
From: Kathleen A. McGinty.
Re: Proposed Utah Monument Designation and Event.

#### INTRODUCTION AND BACKGROUND

This memo responds to your request yesterday for additional information on the proposed event at which you would announce designation of certain Bureau of Land Management (BLM) lands in Utah as a national monument.

In brief, the current proposal is that you should use your authority under the Antiquities Act of 1906 to establish the "Grand Staircase-Escalante National Monument," a new national monument covering approximately 1.7 million acres of federal land in Utah managed by the BLM of the Department of the Interior (DOI).

At your direction, the Secretary of the Interior, in cooperation with the Department of Justice, has prepared the analyses and documents that are required to support creation of the proposed new national monument. A draft version of those materials is attached for your information. Final versions should be transmitted to the White House today and should be ready for execution within 24 hours.

#### **OPTIONS FOR ANNOUNCEMENT**

Three alternate events have been discussed to frame announcement of your action. Some advisors believe that the announcement should take place in a formal Oval Office-type setting, so as to emphasize the presidential character of the action. This course would allow the most scheduling flexibility.

Other advisors recommend that you make the announcement on or near the lands to be covered by the monument designation. The area is very scenic and would offer great, unique visuals, but the country is rough and remote with difficult logistics. The first attached sheet of photos shows views of or from potential event sites on lands covered by the new monument designation. The landscape is sere, but strikingly beautiful. Because of good air quality, views extend beyond 100 miles. Morning and afternoon light bring out the land's colors best. August weather is hot, probably windy, with a chance of afternoon and evening thunderstorms.

The closest town with an airport capable of handling jet aircraft is Page, Arizona, a small town located on the Arizona-Utah border next to Lake Powell and Glen Canyon Dam. Travel time from the Page airport to the most likely event locations would be roughly 15-minutes by helicopter or 1 hour by four-wheel drive vehicle. The National Park Service maintains significant enforcement and other staff nearby at Glen Canyon National Recreation Area and Grand Canyon National Park and can be called upon with short notice to assist with even logistics. Based on our experience with the proposed "condor release" event (which would have occurred in the same general area), I estimate that an appropriate event could be organized with roughly 48-72 hours lead time. The Secretary of the Interior, Bruce Babbitt, notes that this option would have the most confrontational of "in-your-face" character of the three.

The third option would be to hold the event in Jackson Hole. The logistics and scheduling would be much simpler than the Utah site option and, like the Oval Office option, would not present the same confrontational aspect associated with an event in Utah.

For my part, I believe that any of the three options will adequately serve the purposes underlying establishment of a new monument.

#### PURPOSE OF THE LITAH EVENT

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The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. In contrast to the Yellowstone ceremony, this would not be a "feel-good" event. You would not merely be rebuffing someone else's bad idea, you would be placing your own stamp, sending your own message. It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration.

Establishment of the new monument will be popular nationally in the same way and for the same reasons that other actions to protect parks and public lands are popular. The nationwide editorial attacks on the Utah delegation's efforts to strip wilderness protection from these and other lands is a revealing recent test of public interest in Utah's wild lands, In addition, the new monument will have particular appeal in those areas that contribute most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon, and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Phoenix-Tucson area. This assessment square with the positive reactions by Senator Harry Reid (D-NV), Governor Roy Romer (D-CO), and Representative Bill Ricahrdson (D-NM) when asked their views on the proposal.

Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances. It would draw fire from interests who would characterize it as anti-mining, and heavy-handed Federal interference in the West. Governor Bob Miller's (D-NV) concern that Nevada's sagebrush rebels would not approve of the new monument is almost certainly correct and echoes the concerns of other friends, but can be offset by the positive response in other constituencies.

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The attached memorandum from Secretary Babbitt recommends that approximately 1.7 million acres of federal land managed by the BLM in southern Utah be designated as the "Grand Staircase-Escalante National Monument."

The lands in question represent a unique combination of archaeological, paleontological, geologic, and biologic resources in a relatively unspoiled natural ecosystem. Three general areas lying to the west of the Colorado River and to the east of Bryce Carryon National Park would be covered by the new monument: the Grand Staircase, Kaiparowits Plateau, and the Escalante Carryon region.

The Grand Staircase spans six major life zones, from lower Sonoran desert to Arctic-Alpine forest, and its outstanding rock formations present some four billion years of geology. The area includes numerous relict plant areas--rare examples of pristine plant ecosystems that represent the natural vegetative cover that existed in the region before domestic livestock grazing.

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The Escalante Canyon region includes some of the most scenic country in the West, significant archaeological resources, unique riparian ecosystems, and numerous historic sites and trails.

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Finally, the proclamation would direct the Secretary of the Interior to prepare a management plan for the area within three years. Although the precise outcome of the three-year planning process cannot be forecast, the Secretary believes that current uses of the area, including grazing, hunting, fishing, off-road vehicle use and similar activities would generally not be affected at current levels or in current areas of use.

The principal substantive effect of the monument designation will be on a proposed coal mine on the Kaiparowits Plateau.

The Kaiparowits Plateau lies in the center of the area that would be covered by the monument designation. Two companies hold leases to mine federal coal there. One company is working with DOI to surrender its Kaiparowits leases in exchange for rights to coal elsewhere in Utan (a situation quite similar to the case of the New World Mine). The other lease holder, Andalex Resources, a Dutch-owned coal company with plans to ship coal to Asia, has rebuffed DOO's offers to pursue a trade.

Coal development on the Kaiparowits would damage the natural values of the entire area. Monument designations would not block the proposed coal mine, per se, but would help in a variety of ways (described at length in the Secretary's attached memo) to persuade Andelex to surrender its leases in exchange for coal elsewhere. This step—reducing or eliminating the risk of coal mining on the Kaiparowits—would represent an immense victory in the eyes of environmental groups and, based on the editorials written on the subject during the Utah wilderness bill deb, would be widely hailed in the media.

Record Type: Federal (All-in-Mail). Creator: Kathleen A. McGinty (McGinty-KA1) (CEQ). Creation date/lime: 23-Aug-1996 16:29:34.89. Subject: Utah-weekly report. To: Peter G. Umhofer. CC: Thomas C. Jensen

Text: As you know, a draft national monument declaration has been prepared for your review by the Department of Interior. Per your request, the Department studied the area and found it incredibly rich archaeologically (anasasi ruins) and ecologically (unique and pristine natural resources); already in Federal ownership, and therefore, suitable for monument designation under the Antiquities act. In addition, Interior also reports that currently, a foreign coal company called Andalax Resources is pushing to open a coal mine in the heart of the area. While a monument designation is not capable of stopping the mine (all existing property rights and uses would be held harmless), it would make it more difficult for the mining company to secure approval of their request for a 22 mile road that they would propose to run across federal land, again in the heart of this area. In this regard, the situation is very similar to where we were last year on Yellowstone—mine proposed; mine requesting use of federal land. Under these circumstances last year, your exercised authority to withdraw surrounding land from mining activity. Like the monument designation here, that action did not stop the Yellowstone mine, but it did erect significant barriers to it.

It was originally proposed that you would announce the monument during your vacation. Work was pushed to meet that deadline. I am very concerned now that, since we did not move forward at that time, but significant work was done, news of this will leak out. I strongly recommend that we move forward with this initiative. Others are concerned

that it will ignite a ``War on the West" backlash, and indeed, the Utah delegation--including Bill Orton--will be displeased to say the least. However, the attached editorial from the Salt Lake Tribune decries Dole's ``Whine on the West", and in many other places in the west (CO, CA, WA, OR, NM) this would be extremely well received.

In any event, we need to decide this soon, or I fear, press leaks will decide it for us.

Executive Office of the President, Washington, DC, August 23, 1996.

Memorandum for the President. From: Kathleen A. McGinty. CC: Leon Panetta. Re: CEQ Weekly Report.

#### UTAH

As you know, a draft national monument declaration has been prepared for your review by the Department of the Interior (DOI). Per your request, DOI studied the area and found it incredibly rich archaeologically (anasasi ruins) and ecologically (unique and pristine natural resources). Because the area is already in Federal ownership, it is therefore suitable for monument designation under the Antiquities Act.

DOI also reports that a foreign coal company called Andalex Resources currently is pushing to open a coal mine in the heart of the area. While a monument designation is not capable of stopping the mine (all existing property rights and uses would be held harmless), it would make it more difficult for the mining company to secure approval of their request for a 20 mile road that they would propose to run across federal land, again in the heart of this area. In this regard, the situation is very similar to where we were last year on Yellowstone--a proposed mine requesting use of federal land. Under these circumstances last year, you exercised authority to withdraw surrounding land from mining activity. That action did not stop the Yellowstone mine, but it did erect significant barriers to it as would the monument designation here.

It was originally proposed that you would announce the monument during your vacation. Work was pushed to meet that deadline. I am very concerned now that, since we did not move forward at that time, but significant work was done, news of this will leak out. I strongly recommend that we move forward with this initiative. Others are concerned that it will lightle a "War on the West" backlash, and indeed, the Utah delegation--including Congressman Bill Orton (D-UT)-will be displeased to say the least. However, the attached editorial from the Salt Lake Tribune decries Dole's "Whine on the West", and I believe that in many other places in the west (CO, CA, WA, OR, NM) this initiative would be extremely well received.

In any event, we need to decide this soon, or I fear, press leaks will decide it for us.

Executive Office of the President,

September 6, 1996. To: Elisabeth Blaug, Thomas C. Jensen, Brian J. Johnson, From: Kathleen A. McGinty, Council on Environmental Quality. Subject: Wkly report graphs.

### UTAH

We learned late today that the Washington Post is going to run a story this weekend reporting that the administration is considering a national monument designation. I understand that there are no quotes in the story, so it is based only on "the word about town." I have called several members of Congress to give them notice of this story and am working with political affairs to determine if there are Democratic candidates we should alert. We are neither confirming nor denying the story; just making sure that Democrats are not surprised.

Meanwhile, we are working with Don Baer and others to scope out sites and dates that might work for an

announcement on this issue.

Council on Environmental Quality, Washington, DC, September 6, 1996. Memorandum for the President. From: Kathleen A. McGinty. CC: Leon Panetta. Re: CEQ Weekly Report.

#### UTAH

We learned late today that the Washington Post is going to run a story this weekend reporting that the Administration is considering a national monument designation. I have called several members of Congress to give them notice of this story and am working with Office of Political Affairs to determine if there are Democratic candidates we should alert. We are neither confirming nor denying the story; just making sure that Democrats are not surprised. This could lead the Utah delegation to try efforts such as a rider on the Interior Appropriations bill next week to prevent you from taking any such action.

Meanwhile, we are working with Don Baer and others to scope out sites and dates that might work for an announcement on this issue.

Creator: Brian J. Johnson (Johnson, BJ) (CEQ). Creation: Date/Time: 10-Sep-1996 17:07:20.19. Subject: Get a load of this from Kenworthy To: Thomas C. Jensen, Kathleen A. McGinty, Wesley P. Warren, Shelley N. Fidler.

Text:

#### ATTACHMENT 1

Att Creation Time/Date: 10-Sep-1996 14:36:00.00 Att Bodypart Type: E. Att Creator: Kenworthy, Tom. Att Subject: utah, again. Att To: smtp: johnson.

Brian: So when pressed by Mark Udall and Maggie Fox on the Utah monument at yesterday's private ceremony for Mo, Clinton said: "You don't know when to take yes for an answer." Sounds to me like it's going forward. I also hear Romer is pushing the president to announce it when he's in Colorado on Wednesday. Give me a heads up if its imminent—I can't write another story saying it's likely to happen, but it would be nice to know when it's going to happen for planning purposes—Tom Kenworthy.

ps--thanks for the packet.

# ATTACHMENT 2

Att Creation Time/Date: 10-Sep-1996 17:01:00.00 Att Bodypart type: D Text: RFC-822-headers:

Record Type: Federal (All-in-1 Mail).

Creator: Shelley N. Fidler (Fidler–S) (CEQ).
Creation Date/Time: 10-Sep-1996 17:09:13.8.
Subject: Re: Get a load of this from Kenworthy.
To: Brian J. Johnson, Thomas C. Jensen, Kathleen A. McGinty, Wesley P. Warren.

Text: why didn't he write about MO that would have been useful and nice and well deserved, what a creep.

Creator: Thomas C. Jensen (JENSEN-T) (CEQ). Creation date/time: 10-SEP-1996 17:09:24.95.
Subject: re: Get a load of this from Kenworthy.
To: Brian J. Johnson; Kathleen A. McGinty; Wesley P. Warren; Shelley N. Fidler.

Text: Wow. He's got good sources and a lot of nerve.

Record type: Federal (External mail). Creator: kenworthyt.
Creation date/time: 11-SEP-1996 22:22:00.00. To: johnson.

Text: south rim of the grand canyon, sept 18--be there or be square

#### ATTACHMENT 1

ATT Creation time/date: 11-SEP-1996 22:22:00.00 ATT Bodypart type: D

Council on Environmental Quality, Washington, DC, September 16, 1996.

Memorandum to the President. From: Kathleen A. McGinty. Subject: Utah Monument Proclamation.

The Secretary of the Interior prepared the attached materials in response to your request to him for information on federal lands in southern Utah that should be granted national monument protection under the Antiquities Act.

In brief, the Secretary proposes that you use your authority under the Antiquities Act to establish by proclamation the "Grand Staircase-Escalante National Monument." The monument would cover approximately 1.7 million acres of federal land in south central Utah managed by the Interior Department's Bureau of Land Management (BLM).

National and Utah environmental groups have pressed Congress to designate approximately 5.7 million acres of BLM land in Utah as "wilderness areas," a potentially more restrictive land use category than "national monument" status. The proposed Grand Staircase-Escalante National Monument would be welcomed by the environmental groups as a tremendous step toward protecting the areas they care most about, including the areas facing the greatest development threat from proposed coal mining. They will, however, continue to press their case for the much more stringent and larger wilderness designations.

The proposed national monument includes approximately 400,000 acres of BLM lands that environmental advocates want to see protected, but that have not been proposed for formal wilderness protection because the acres contain features that render them legally ineligible for wilderness status. The lands are essentially the interstices between large blocks of wilderness-eligible lands. They contain resources that qualify monument status, as described in the Secretary's memo to you.

Since news of the proposed monument leaked to the Los Angeles Times and Washington Post last week, we have Since news or the proposed monument leaked to the Los Angeles Times and washington Post last week, we nay received strong endorsements for this proposal from many quarters, including national and western newspapers, Democratic Senate and House candidates in Montana, Idaho, and Colorado, western Democratic Senators and House Members, key authorizing and appropriating committee members, western governors, and numerous environmental and conservation groups. The Utah delegation, including Democratic Congressman Bill Orton, Governor Leavitt, and the NRA have spoken out in strong opposition.

In this regard, much of the opposition from Utah has been premised on concern over the monument's possible impact on school revenues. We have compiled a considerable body of information on this issue. Based on CEQ, OMB, and Interior Department analysis of reports prepared by various State of Utah agencies, it appears that the proposed AndaleviSmoky Hollow Mine would generate less than \$75,000 per year for Utah school expenses. Utah's annual education budget is approximately \$1.6 billion. The criticism based on ``lost" school income appears to be wildly overstated.

Secretary Babbitt anticipated the level and type of opposition we have now heard directly. The Secretary has proposed that, in establishing the monument, you take several steps to reduce short- and long-term opposition from Utah's pro-development interests and rural residents. First, he proposes that BLM, rather than the National Park Service, manage the monument. Second, he proposes that you expressly disclaim any reservation of federal water rights for the monument. Third, the Secretary has proposed monument boundaries that exclude all developed areas and state park lands. Fourth, the Secretary has proposed that the new management regime for the monument area be defined through a multi-year public hearing and involvement process.

White House and Interior Department representatives have met or conversed extensively over the past week with members of the Utah delegation and the Governor's office. Based on those communications, we recommend that the monument proclamation disclaim any effect on management of grazing, hunting, or fishing activities. In other words, those activities would be governed by current law, notwithstanding the monument designation.

In addition, we recommend that you direct the Secretary to pursue negotiations with the State of Utah to trade state-owned parcels within the boundaries of the monument for federal lands of equal value elsewhere in Utah, thus ensuring that the state interests are protected. This direction would come in the form of a separate memo to the Secretary, not in the proclamation.

The draft proclamation submitted by the Secretary has been amended to reflect the hunting/fishing/grazing point described in the preceding paragraph.

Record type: Federal (External Mail).

Creator: kenworthy.
Creation: Date/time:16-Sep-1996 12:30:00.00.

Subject: utah. To: johnson.

Text: Nine touch doing the Escalante Canyons announcement on the birthday of Utah's junior senator! Give me a call

if you get a chance.

Attachment 1

Att Creation time/date: 16-Sep-1996 12:32:00.00

Att Bodypart type: D

The Socretary of the Interior, Washington, September 13, 1996. Hon. Robert F. Bennett, U.S. Senate, Washington, DC.

Dear Senator Bennett:

I am responding to your letter I received yesterday regarding the proposal to create a new national monument in southern Utah. While no final decision on establishing a monument has been made, your letter nonetheless raises valid concerns, and I do believe they merit full discussion.

You ask, first, whether the proposed monument would carry with it a reserved water right, and if so, what effect it might have on water users, the Colorado River Compact, and various proposed water development projects. These are questions of very legitimate concern, and I look forward to discussing them further with you, Congressman Orton, Governor Leavitt, and other interested parties.

Your second group of questions involves the effect of establishment of a national monument on state lands within its boundaries. We certainly share your concern that the state public school system not be impaired by establishment of a national monument. As you know, the issue of how to deal with state inholdings scattered across federal lands managed to protect nationally significant values is a common problem throughout the west. Many national parks, national forests, national monuments, and other projected federal areas contain state inholdings. The most common way to address these is for the state and the federal government to agree upon an exchange, whereby the state agrees to trade its inholding in return for public lands of equal value outside the protected area. I look forward to discussing this further with you.

Your final set of questions involves the status of existing mineral leases and rights in the area under consideration as a national monument. The only mineral interests of any significance I am aware of in the area are existing federal coal leases issued many years ago. Most of these leases have expired of their own terms, or been relinquished, or are in the process of being cancelled pursuant to law. Two leases or lease groups remain. One is held by Pacificorp, and we are currently in very serious discussions with that company to relinquish its lease on the Kaiparowits Plateau in exchange for bidding credits on federal coal of equal value elsewhere.

The remaining lease interest is held by Andalex Resources, Inc. This company has applied for a number of permits or other authorizations required by federal and state law in order to open a mine on the Kaiparowits Plateau. A draft environmental impact statement is currently being prepared on the proposal. Should a national monument be established, and should the company continue to seek permission to move forward with its proposal, a determination would have to be made whether the Andalex proposal is inconsistent with the purposes of the monument, and if so, whether and to what extent the company has valid existing rights that would have to be addressed.

I appreciate the opportunity I've had to discuss these issues with you, with Congressman Orton, and with Governor Leavitt. I look forward to further discussions in the very near future.

Sincerely,

Bruce Babbitt.

## ENDNOTES:

- 1. Based upon representations of CEQ staff, all documents in the possession of CEQ regarding the Grand Staircase-Escalante National Monument have now been produced.
- 2. See Report to accompany S. 4698, Rpt. No. 3797, 59th Cong., 1st Sess. (May 24, 1906).
- 3. Whether DOI ever actually received the Clinton letter is at issue because: (1) DOI was asked to provide all Utah Monument documents to the Committee, but never supplied the August 7, 1996, copy signed by President Clinton-that version was supplied to the Committee by the White House after the Chairman was authorized on September 25, 1997 to subpoena Utah Monument documents; and (2) this strategy--to create the letter as a paper trail but never send it--was discussed in White House e-mail traffic.

## RELATED DOCUMENTS:

April 29, 1997 Hearing: Witness List and Transcript - Printed Hearing Serial No. 105-20.

Oversight Hearing held on:

Grand Staircase Escalante National Monument: From Designation to Management.

Legislative Hearing held on:

H.R. 1127, to amend the Antiquities Act to require an Act of Congress and the concurrence of the Governor and the State legislature for the establishment by the President of national monuments in excess of 5,000 acres.

Act of June 8, 1906 (Antiquities Act) (16 U.S.C. 431 et seq.)

#### Press Releases:

 White House Subpoenaed For Documents On Controversial Utah Monument Designation; White House Threatens Executive Privilege Claim Over Grand Staircase-Escalante (October 10, 1997).

 <u>U.S. House Committee Grants Subpoena Authority</u> For Records Related To The Grand Staircase-Escalante National Monument (September 24, 1997).

Mr. Hansen. Thank you.

We found that the Solicitor, John Leshy, instructed all of these people, saying "I can't emphasize confidentiality too much. If word leaks out, it probably won't happen. So take great care."

We also saw where Kathleen McGinty, from CEQ, said "I do not think there is a danger of abuse of the withdrawal/antiquities authority, especially because these lands are not really endangered" and there's no reason to do it. Anyway, out of that, we got 1.7 million acres. Compare that with what we had prior to that time.

Mr. Chairman, I'm really saying that the process bothers us. I'm not taking the President on. He had the right to do that, the right to create all 19 of them, I guess, if he wanted to. But I really feel in my heart of hearts that it's an abuse of the ground. I don't care if you're Republican or Democrat or whoever he was, these were supposed to be small, individual areas. They were not intended to go in and try to create a de facto wilderness or whatever it may be.

I am always amazed that people talk about the protection it's giving the ground. Those who say that are not familiar with the Act. The Act basically gives nothing. It has to have a management plan draw up, to say, well, what are we going to do within that confines. Other than that, it's just a name. So that's what we have found in this particular area.

Mr. Chairman, you mentioned the idea of what do we do to correct it. Because of the other acts that are there, that give a lot of protection to the ground, and as I couldn't say enough, the Constitution only gives Congress the right to work with the public grounds of America—with one exception. And that's that 1906 Antiquities law.

You may recall in the 105th session of Congress we passed a law—it went through overwhelmingly in the House—that said the President could limit—we're trying to strengthen the law—would have to limit himself to 50,000 acres. I don't know if folks realize how big 50,000 acres is. That's bigger than, by far, most of the monuments that were created prior to President Clinton.

To give you an example, Washington, D.C. is 38,000 acres, so it would be bigger than Washington, D.C., if someone wanted to go

up to that.

The second thing we did in the 106th session of Congress, as you may recall, is we said he's got to give notice to the governor of the State, the congressional delegation, and the State legislature. That passed 408 to 2. Now, at this time you say what can we do so it doesn't get out of control, that we can handle this thing without having these things put all over the West—and some of them, we are given to understand, were created in 1 day, compared to how long it takes the Committee to do that.

Mike Simpson of Idaho, who has taken those two laws I have just referred to and he bundled them together, that legislation was heard in the Resource Committee last week. Of course, because it's been heard before, we will bring his other bill to the floor and we would wish to have the support of all of you on that piece of legislation. I think it's good legislation. Those two bills did not make it through the Senate. As many of us know, it's very hard to get

things through the Senate from time to time.

I still remember—and forgive me, Mr. Chairman, for saying this—but when I walked in here 20 years ago, there was a fellow by the name of Thomas P. O'Neil, who was talking to the freshman class, the Speaker of the House. He said, "One thing you'll learn. The House does all the work and the Senate gets all the attention." I say that respectfully. But we sent over there maybe a hundred-and-something pieces of legislation that, if they were passed, were passed in the last few minutes. So this time we are hopeful that that particular piece of legislation could make it through.

Mr. BARR. Mr. Chairman, if you would submit a copy of that piece of legislation, so that we might include it in our record along

with your testimony.

Mr. HANSEN. I would be pleased to, Mr. Chairman. We will have that to you.

[The legislation follows:]

106TH CONGRESS 1ST SESSION

# H.R. 1487

# AN ACT

To provide for public participation in the declaration of national monuments under the Act popularly known as the Antiquities Act of 1906.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,

1	SECTION 1. PUBLIC PARTICIPATION IN THE DECLARATION
2	AND SUBSEQUENT MANAGEMENT OF NA-
3	TIONAL MONUMENTS.
4	Section 2 of the Act of June 8, 1906 (34 Stat. 225,
5	16 U.S.C. 431; popularly known as the Antiquities Act
6	of 1906), is amended—
7	(1) by striking "Sec. 2. That the" and insert-
8	ing "Sec. 2. (a) The"; and
9	(2) by adding at the end the following:
10	"(b)(1) To the extent consistent with the protection
11	of the historic landmarks, historic and prehistoric struc-
12	tures, and other objects of historic or scientific interest
13	located on the public lands to be designated, the President
14	shall—
15	"(A) solicit public participation and comment in
16	the development of a monument declaration; and
17	"(B) consult with the Governor and congres-
18	sional delegation of the State or territory in which
19	such lands are located, to the extent practicable, at
20	least 60 days prior to any national monument dec-
21	laration.
22	"(2) Before issuing a declaration under this section,
23	the President shall consider any information made avail-
24	able in the development of existing plans and programs
25	for the management of the lands in question, including
26	such public comments as may have been offered.

- 1 "(e) Any management plan for a national monument
- 2 developed subsequent to a declaration made under this
- 3 section shall comply with the procedural requirements of
- 4 the National Environmental Policy Act of 1969.".
- 5 SEC. 2. RULE OF CONSTRUCTION.
- 6 Nothing in this Act or any amendment made by this
- 7 Act shall be construed to enlarge, diminish, or modify the
- 8 authority of the President to act to protect public lands
- 9 and resources.

Passed the House of Representatives September 24, 1999.

Attest:

Clerk.

Mr. Hansen. We feel that that will kind of stop any problems that could come about. But if the President, whoever he may be, of whatever political persuasion, finds something somewhere and he, in his wisdom, feels it should be protected, that particular piece of legislation would give him the tools to do it, without going in and creating the kind of problems that we have with the 19 we've got.

If I may add just one thing, we sent a letter out, myself and Chairman Hefley, who chairs the Subcommittee, to all of the members who have a new monument in their district. In essence, it says this: If you had had a hand in it, how would you have done it? Now, I can't find one member who has had a monument put in his district that had a hand in it. As I have read to you what happened on the Grand Staircase-Escalante, I would worry about it. If they had come to me and said, "Mr. Chairman, we want some help on this", I would have said fine, let's put in 50 Mile Mountain as a conservation area. Let's put Paria Canyon in as a heritage area because that's what it is, and we would have something beautiful.

Do you know what the majority of that is? Contrary to what Mr. Leshy—and I think John's a very fine attorney, but when we asked

him what was there, there is no beautiful, scenic, pristine, wonderful area to preserve. It's like much of the West, rolling hills of sagebrush, and jack rabbits and rattlesnakes, and no much more, if I may say so.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hansen follows:]

PREPARED STATEMENT OF THE HONORABLE JAMES V. HANSEN, A REPRESENTATIVE IN Congress From the State of Utah

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to address the committee regarding the abuses of the 1906 Antiquities Act we have experienced during the past administration and what might be done to prevent these abuses in the future.

Before I go further, let me be clear about one point. While some critics will prefer to attribute my remarks to political differences, my testimony today is not about President Clinton, nor is it about whether or not lands designated as monuments were a good idea. My testimony is about process. In our nation, it is the process we value and it is the process that protects all of us. We should be very hesitant to praise a preferred outcome when the process required to achieve it places our future freedoms in jeopardy. Those who do heap praise upon these abuses of power should remember that those who exercise that power will not always be sympathetic to their concerns and wishes. Thus, I hope my testimony will be helpful to the committee in assessing how to prevent these abuses in future administrations, whether

they be Republican or Democratic.

On September 18, 1996, President Clinton stood safely on the south side of the Grand Canyon of Arizona and designated 1.7 million acres of southern Utah as a national monument. The first time that I, or any other official that the people of Utah had elected to represent them, heard about the new national monument was on September 7, 1996 when the Washington Post published an article announcing that President Clinton was about to use the Antiquities Act of 1906 to designate a national monument in southern Utah. Naturally, the people of Utah, as well as their representatives, were concerned. Many of us found it hard to believe that the President would be considering something like this without any consultation with the people of Utah or those elected to represent the people of Utah. When our Congressional delegation expressed concern about a prospective designation directly to the White House and the Secretary of the Interior we were told that nothing was imminent and that these were just ideas being kicked around and that we shouldn't take them too seriously.

Privately, however, the administration had already made its determination long before it was leaked to the press. In fact, they were doing their best to ensure that there would be absolutely no input from the public or their elected officials. By July of 1996, the Department of the Interior had already hired a law professor to draw up the monument proclamation with the Department's Solicitor John Leshy inthe monument proclamation with the Department's Solicitor John Lesny Instructing him by letter that "I can't emphasize confidentiality too much—if word leaks out, it probably won't happen, so take care." In addition, on August 5, the White House CEQ Chair Katy McGinty wrote a memo to Marcia Hale about the monument stating that "any public release of the information would probably foreclose the President's option to proceed." The Administration continued to deny that anything was in the works until 1:00 AM the morning of the day that he signed the proclamation when the President finally returned a call from Utah's Governor with the power that it was already a deep deal

with the news that it was already a done deal.

The Administration did not pursue this course blindly. They knew this was not the way this power was intended to be exercised. Another subpoenaed document written by CEQ Chair Katy McGinty to T.J. Glauthier at OMB reads: "I do think there is a danger of abuse of the withdrawal/antiquities authorities, especially because these lands are not really endangered." In addition, Ms. McGinty wrote in March of 1996 to Linda Lance in the White House stating: "I realize the real remaining question is . . . the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation. Presidents have not used their monument designation authority in this way in the past .

In order to add some context to my testimony regarding the Antiquities Act, let me briefly review some of the legislative debate that took place prior to its enactment. In 1888, two ranchers discovered seven century old multi-roomed dwellings nestled under an overhang in the cliffs near Mesa Verde. They discovered several ancient artifacts and began to dig and then sell these items. In order to facilitate their discovery they completely decimated the ruins, knocking down walls and using beams from the roof for firewood. As these kind of stories began to reach Congress they realized that something needed to be done to protect these areas before they were all destroyed and their scientific and cultural value was gone. The first archeological reservation in Casa Grande Arizona was done legislatively. However, Congress soon realized that protecting each and every site individually, and in a timely fashion would prove to be a daunting task, so they decided this authority would have to be delegated to the President. For about six years they debated various proposals, concerned about whether allowing the President to protect 320 or 640 acres at a time was wise. However, the final compromise allowed that the President could "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are owned or controlled by the Government of the United States to be national monuments." The size of such withdrawals would be in all cases "confined to the smallest area compatible with the proper care and management of the objects to be protected." The compromise quickly passed both houses of Congress and was signed by President Theodore Roosevelt on June 8, 1906.

It is important to note that Congress specifically rejected the proposal that national monument withdrawals extend to national park type preservation of land. While subsequent uses proclaimed the Grand Canyon and Zions as national monuments and were clearly outside the scope of the act, with very few options available for preserving such lands in 1906, the American people generally allowed Presidents to exceed this authority. In time, Congress filled this void, enacting legislation such as the 1916 Organic Act, which created the National Park Service and the 1964 Wilderness Act, which created the National Wilderness Preservation System. In 1968, they passed the Wild and Scenic Rivers Act, the National Environmental Policy Act of 1969, and the Federal Land Policy and Management Act of 1976. The cumulative effect of these laws and others made it easy to preserve large portions of land without allowing the president to abuse the Antiquities Act. Thus, Congress established a legal framework, and has been using that framework, to preserve and manage public lands through the creation of national parks, wilderness areas, historical areas, recreation areas, and wildlife refuges.

Returning to the creation of the Grand Staircase Escalante National Monument in southern Utah for a moment, I think it is particularly instructive to note the justification given for avoiding the normal legal and statutory process for the management of public lands. In April of the year following the monument's creation, CEQ Chair Katy McGinty stated before Congress that "for decades people of goodwill and divergent opinions have debated the proper management of Federal lands in Utah. Questions have remained unresolved for two generations or more . . . the President has put forward the mechanism finally to break loose a large and important area of Federal lands in Utah from the gridlock." That comment is stunning to me. I don't think I have to expound very much on how dangerous this kind of thinking can be. Allowing for that type of debate on issues is what the democratic process is all about. Does this mean that any time debate goes on past an arbitrary deadline, the executive branch must sweep in and cut off legislative debate by executive order?

It is also important to note that as many of you know, President Clinton was undeterred by opposition to his use of the Antiquities Act, creating 18 more monuments and two expansions during his time in office, with eight of those coming in the final week.

The Constitution was designed in a manner specifically to prevent these types of abuses. When one branch desires to exercise its power arbitrarily, it is the duty of the others to check that power. The failure to act by Congress erodes the authority of the legislative branch and encourages abuse in the future, whether by future Republican or Democratic executives. During the 105th Congress, the House passed legislation that required Congressional approval of a monument designation larger than 50,000 acres. If Congress did not approve of the designation within two years, the monument designation would sunset. This legislation passed the House with only two dissenting votes. In addition, during the 106th Congress, the House passed legislation requiring 60 days notice to the Governor and Congressional delegation and to provide for public input to the greatest extent possible. Again, I plan to move legislation through the Committee on Resources this year that will incorporate these two bills. I believe this legislation is essential to the proper balance of authority. Once again, I appreciate the opportunity to appear before you and would urge you

Once again, I appreciate the opportunity to appear before you and would urge you to act appropriately to limit the erosion of legislative authority. Thank you.

Mr. BARR. Thank you very much, Mr. Chairman.

Senator Hatch, your colleague from the great State of Utah, was going to join us here today. His responsibilities in the Senate prevented him from being here. But he was kind enough to submit a statement, and I would ask unanimous consent that that statement be included in the record.

Without objection, so ordered.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF THE HONORABLE ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

PRESIDENT CLINTON'S DECLARATION OF THE GRAND STAIRCASE-ESCALANTE MONUMENT

Mr. Chairman, I thank you for holding this hearing today and for the opportunity you have given me to make a statement for the record.

As my colleagues know, on September 18, 1996, President Clinton, in the midst of a reelection campaign, invoked the Antiquities Act of 1906 to create what is now the 1.9 million acre Grand Staircase-Escalante National Monument in southern Utah

Mr. Chairman, by using an executive order, President Clinton was able to act without any consultation with the Utah congressional delegation, our governor or any other elected official in Utah. Let me emphasize this point; there was no public process, no hearings, no town meetings, no TV or radio discussion shows. There was not even input by federal land managers who understand and work in this region. As I stated last September, in all my 24 years in the U.S. Senate, I have never seen a more clear example of the arrogance of Federal power than the proclamation creating this monument. I still consider it to be the mother of all land grabs.

It is true that the Antiquities Act does not require the President to seek public input, but because he took this path of secrecy, he chose not to learn of the harm he would cause to the people of southern Utah. Acting by executive fiat, he shielded himself from the consequences of his action. And we were all reminded of this fact when he announced this new monument from the Grand Canyon in Arizona. What could have caused celebration among Utahns, instead, caused acrimony and bitterness. Public trust in our federal government reached an all-time low in southern Utah, and the wounds inflicted then are still felt today.

Mr. Chaimnan, as the members of this committee know, the "Property Clause" in Article IV, sec. 3 of the U.S. Constitution gives Congress the authority to dispose of and make needful rules and regulations regarding property belonging to the United States. In my view, it is clear that Congress never willfully gave away this power—not even through the Antiquities Act. I believe that in passing the Antiquities Act, Congress sought only to give the President the power to protect objects of real historic or scientific value that are in actual jeopardy. Congress never intended to give the President unfettered power to manage vast tracts of public lands according to his whim. This may not have been clear to President Theodore Roo-

sevelt when he granted

protection to the Grand Canyon using the Antiquities Act, but Congress clarified it further when it later passed strong laws for the management of public lands, such as the Federal Lands Policy and Management Act, the Wilderness Act, the National Environinental Policy Act, and others. These laws require an open and public process, always under the purview of Congress. That is what the Constitution demands. I also want to address the scope of the president's order. In the Antiquities Act,

Congress explicitly stated that when using the act, the President should include "the smallest area compatible with the proper care and management of the objects to be protected." In his proclamation designating the Grand Staircase-Escalante Monument, President Clinton pointed to a planned underground coal mine in the Kaiparowits Plateau, the largest untapped field of clean coal in our nation. The underground mine was to be along an existing road in a depression which is out of sight for anyone not directly on the location. The mine would have disturbed only 40 acres in this area which, by the way, is a very desolate and unattractive region. If any tourist or hiker seeking solace ever came upon this area, they most assuredly were lost. There is certainly nothing of scenic, historic, or scientific value on or around the proposed mine site.

If the president were sincerely seeking to protect this homely piece of public land, he could have done so by creating a 40-acre monument there. Instead he withdrew nearly two million acres, which is almost twice the size of the Grand Canyon, and larger than the states of Rhode Island and Delaware combined. With one proclamation, he doubled the acreage of national monuments in our nation. Of the 13 monuments in our nation.

ments designated by President Clinton, alone, 40 percent of the acreage is found in

the Grand Staircase-Escalante Monument.

This was not simply a move to protect a particular object or even a collection of objects of historic or scientific value. There are a number of such sites within the monument, but such sites can be found throughout the entire state. This action by the President was an attempt to create a management scheme for a gigantic tract of public land—a management scheme being pushed by politically active advocacy groups, a management scheme that he knew would never survive an open public process or the oversight of Congress.

Mr. Chairman, there will be those who argue that monument designations, though sometimes controversial, eventually gain the favor of the public, but this is not about public opinion polls. What we have seen is a power grab by the Executive branch of a power explicitly given to Congress by the Constitution, and a power that

branch of a power explicitly given to Congress by the Constitution, and a power that Congress never intentionally gave up. For this reason, I have introduced legislation in the past to clarify the intent of the Antiquities Act, and I have supported similar measures by other members of Congress. I hope that in the 107th Congress such a measure can be enacted.

Mr. Chairman, we in Utah continue to work with the hand President Clinton has dealt us, and it has not been easy. I hope that Congress is able to ensure that other citizens do not have to experience the end-run around democracy that we have seen in Utah. I thank you and the members of this committee for this chance to make these remarks.

Mr. BARR. We have been joined by the distinguished Vice-Chairman of the Committee, the gentleman from Arizona, Mr. Flake. Mr. Flake welcome and good morning.

Flake, welcome and good morning.

At this time, we had announced earlier that, in deference to Chairman Hansen's schedule and his responsibilities, we would move immediately to any questions that there might be for him before we move on to the rest of the panel.

I would like to recognize for purposes of any questions for the

Chairman, the gentleman from Arizona.

Mr. Flake. Thank you, Mr. Chairman. I apologize for being late. We all agree—and coming from Arizona, with a lot of sagebrush and rolling hills, and with a lot of designated monuments and, I think, aside from Utah, Arizona has been the most negatively impacted by this. What do we do now? The situation we're in, a lot of this has gone. We will hear from Mr. Fein and others, I guess, on the legal ramifications of moving forward. But what do you suggest.

Mr. Hansen. What would we—Excuse me?

Mr. Flake. Can we do anything retroactively, or—

Mr. HANSEN. We have asked the members who have the monuments if they—we've put it to them this way. If you have had a hand in it—because they did not—

Mr. FLAKE. Right.

Mr. HANSEN [continuing]. How would you have done it? Now, some of the members who said they've gone to their governors, they've gone to their legislators, their county commissioners or city councilmen and others and said, how would we have done this if we've had an opportunity. Some of them are saying we repeal it.

Our good friend from southern Arizona, Mr. Izolbe, Jim has told me, he said we'll leave it alone. This was one of the smaller ones. Bob Stump, on the other side, Chairman Stump of the Armed Services Committee, he wants to make a change. Denny Rehberg, up in Montana, wants to make a change. In the State of Idaho they want to make a change. Doc Hastings up in Washington wants to make a change. Chris Cannon in southern Utah wants to make a change. And many others.

So we will look at it and, frankly, I would have a hard time voting against something. If someone who represents the area feels it should have been done differently, feels that it did not accomplish any preservation or protection to a particular area, then we possibly should do it. I think that can be done, and we're looking for-

ward to seeing if there's a possibility of doing that.

I really, honestly, wish this administration had worked with us. If they had, that would have been fine. In all deference to what people think, that myself and Secretary Babbitt didn't get along, we got along fine. But Secretary Babbitt, really, if I may be brutally candid, did not make those calls. He suggested some of them, admittedly so, and so did Mr. Leshy, his Solicitor. But they would counsel with me on them and the calls were not really—they were asked to make the suggestions and they did.

What bothers us is why didn't we have a hand in it? I remember when I was Speaker of the Utah House, I used to be very offended when the Federal Government would usurp something right on the top of us and say this is it, you're going to live by it. Well, maybe it didn't apply to Utah. It may apply to Massachusetts or somewhere else but didn't apply to us. Why didn't we get a hand in it?

If you want to upset folks anywhere in America, just have the big government come in and tell them just exactly how it's going to be and they don't get much to say about it. That upsets our people, I don't care what political persuasion they are. We find that very offensive. That's why I think the feelings on this—and I don't know about the State of Arizona. I can tell you in Utah, I can tell you in Idaho, because I've been there talking to those people. There are some really mad folks out there.

Mr. Flake. I agree. Part of the problem we have in Arizona are some easements there for transmission lines, and given the current problems we're having on the energy side, that will have an impact as well. Those were negatively impacted by these decisions. So, as

mad as you are in Utah, I think in Arizona we're equally so.

Thank you.

Mr. BARR. Thank you.

The Chair recognizes the gentleman from North Carolina, the

distinguished Ranking gentleman, for 5 minutes.

Mr. Watt. Thank you, Mr. Chairman. I probably won't take the 5 minutes. It may be actually better for me to address some technical questions to the remaining witnesses.

Let me just kind of get an outline here. Was the designation that you're having some concerns about done as an executive order?

Mr. HANSEN. Excuse me, Mr. Watt. I must be going deaf in my old age. I didn't pick that up. I'm sorry. Would you repeat?

Mr. WATT. Was this designation that you are complaining about done as an executive order?

Mr. HANSEN. It was done as a proclamation, where he has the right, under that law, to do a proclamation and set aside part of the land. I have a copy of the proclamation, if that would be helpful to you.

Mr. Watt. So was it done pursuant to the Code of Federal Regulations, or was it done pursuant to the statutory provision? I don't know that it would make a lot of difference. I'm just trying to fig-

ure out what the——

Mr. HANSEN. We have argued that in our Committee ad nauseam, does it make a difference if it's an executive order or proclamation or what. It seems to be a little blurry line. Maybe these gentlemen sitting to the right of me will elucidate on that.

Mr. WATT. I'll direct it to them when they come around. I

thought maybe you could-

Mr. Hansen. I wish we could. Our people have gone that same path, trying to say what was it, what do you consider something under the 1906 history; is it kind of amorphous, or what is the thing? We haven't quite got it worked out.

Mr. Watt. Okay. I will reserve the rest—I'll just wait and try to

get those questions answered later. I think I'll yield back. I appre-

ciate the gentleman for being here.

Mr. BARR. The gentleman yields back.

The gentleman from Pennsylvania, Mr. Gekas—

Mr. Gekas. Yes, thank you.

Mr. Barr [continuing]. Is recognized for 5 minutes.

Mr. Gekas. Thank you, Mr. Chairman.

I just wonder, Jim, if you, in your thorough analysis of that situation that's been so vexatious to you and to your constituents, is a possible solution a new proclamation or executive order, or action taken by this President to modify or change or to eliminate the previous proclamation? Is that in the possibilities?

Mr. Hansen. Of course, I can't speak for the President, and I don't know what he would do. I did have a conversation with the Vice President, who I served with on the Interior Committee for three terms. He said they were looking into it. I haven't followed

up on that.

But let me say we're given to believe—and I don't know if it's true, and we can't seem to figure it out—but years ago President Johnson expanded the Capital Reef National Park. We were given

to understand that President Nixon negated that work.

Now, maybe it's unfair for me to say this, and I'm not sure that's true. We've got some of our legal folks working at it right now, looking at it. I guess he could do it, if he was so inclined to do it. I don't know the answer.

I have explained to you how, by legislation, we're looking at it, that we may want to fine tune them, massage them, maybe repeal some. But a long laborious legislative thing is always a very difficult way to do it.

Mr. Gekas. Yes. Perhaps the remainder of the panel could address my inquiry in their prepared remarks and in the answers

they might provide during the Q&A.

That's all I have at the moment. Thank you, Mr. Chairman.

Mr. BARR. The gentleman yields back.

The gentlelady from Wisconsin is recognized for 5 minutes. Ms. BALDWIN. Thank you, Mr. Chairman.

Just along the same lines of the previous question, when you have been discussing with the—the situation with the other members who have these monuments within their districts, have there been any other remedies that have been proposed that you're considering actively at this point, aside from the legislation that you earlier discussed, that you would like to direct to our attention today?

Mr. Hansen. I'm sure looking for an inspired idea to come for us, but so far it's been maybe by legislation, start working on them. Some of the ideas of, well, this really shouldn't have been an antiquity thing because it doesn't fit the law, but maybe it would be a conservation area or maybe part of it would be a heritage area or a historic site, and so we've asked them to kind of reinventory the area that we're looking at and see if we can find something that kind of fits the criteria of those three areas, and have kind of left it up to the member to do what he may want to do.

But we haven't thought much about it ourselves. We don't have any precedence to work on, you know. We just can't go back—We're creating it ourselves. Maybe these gentlemen know much more about that than I'll ever know. I wish I could stay and listen, but

I can't. But I'll leave some of my folks here.

A great question. I just wish I knew the answer to it. Possibly in another month or two there will be some creative ideas that will spring forth.

Ms. BALDWIN. Thank you. No further questions.

Mr. BARR. Thank you. I recognize myself for 5 minutes.

Thank you very much, Chairman Hansen, for being with us today. We appreciate your leadership on this and so many other

issues regarding our natural resources.

Just one question. I know you're familiar with the Antiquities Act in particular, and interpretations thereof and opinions relating thereto by the Department of Justice. Do you feel there is clear authority for a President—in this case, George W. Bush—to, by executive directive, modify the action of the prior President regarding any particular use or misuse of the Antiquities Act, such as the one you mentioned?

Mr. Hansen. Mr. Chairman, in my opinion, he could. If he wanted to go down the same path and modify it by a proclamation, I think he has all the authority under the 1906 antiquity law to do

that, if he was so inclined to do it.

I was of the opinion that maybe the members who had it, if they wanted to go talk to the President after they've come up with and formulated some plan to do it, that it wouldn't be a bad idea for them to do that. That would be a lot less painless in taking it through the legislative hoops that we go through.

through the legislative hoops that we go through.

But I have to say that I really feel the first drive and push of this Committee is to put the act in the parameters that we can work in. I think Mr. Simpson of Idaho's bill, which we already have

had basically passed in the House, would remedy that.

Mr. BARR. What is there—Presidents have repealed prior executive orders issued by their predecessor. It's done, not necessarily on

a routine basis, but there are many, many precedents for it.

Is there something about the Antiquities Act that—and I know there's a 1938 opinion of the Attorney General, that a President could not undo a prior designation under the Antiquities Act. But, in your view, if a President uses a presidential directive, proclamation or executive order to declare certain lands as antiquities under the Act, and has done so improperly, why could not a subsequent President completely undo it?

Mr. HANSEN. We've wrestled with that same question. The President, of course, can create a monument, a national monument,

using that Act. In effect, he creates law by doing that. I don't know—and we have wrestled with this, can a President, with an executive act to undo it, can he create law? I don't know if he can. I think maybe that's reserved to the Congress. But somebody that knows it better than I would—I don't know where we're going to find anything to hang our hat on. You know, we haven't got a legal hook here to find. So I don't know the answer to that.

I was hoping I would turn to you and members of your Committee who would give me a well thought out and well reasoned legal answer to that one.

Mr. BARR. I think we'll probably get at least three well thought

out answers to that from the rest of the distinguished panel.

If there are no further questions for Chairman Hansen, I would like to thank you once again, Chairman, for being with us, and as I said, for your continued leadership on this issue in particular, along with so many others. We appreciate your being with us today, and if there's any additional material, we certainly would like to include that in the record of this case, along with your full statement that you submitted. It is so ordered, without objection.

Mr. HANSEN. Thank you, Chairman Barr.

I would like to leave with you, if I could, the work we did called "Behind Closed Doors". Would that be permissible?

Mr. BARR. That would be and, without objection, that will be included in the record.

Mr. HANSEN. Thank you so much.

Mr. BARR. Thank you, Mr. Chairman.

Mr. BARR. At this time, subject to pending action on the floor, I would like to recognize and thank the three panelists that we have with us today.

Beginning with Mr. Fein, already introduced to the Subcommittee and the audience, I would ask Mr. Fein to take his allotted 5 minutes to summarize his statement, or make whatever comments he likes, and then we'll move on to the other two members. Mr. Fein.

# STATEMENT OF BRUCE FEIN, ESQ., FORMER ASSOCIATE DEP-UTY ATTORNEY GENERAL AND CONSTITUTIONAL LAW EX-PERT

Mr. FEIN. Thank you, Mr. Chairman, and Members of the Subcommittee.

I would like to briefly sketch the legal landscape as a backdrop for perhaps answering some of the more particular questions and what might be done. It has to be brief as a concession to the shortness of life, since there have been volumes written upon these particular issues.

I think it's useful to think about presidential unilateral authority, including executive orders, proclamations and otherwise, as resting either on the United States Constitution—where the President derives his powers from Article II, where the congressional role in circumscribing and directing the President's exercise of authority is very narrow—and those exercises of executive authority that rest upon a congressional statute, where perhaps Congress' control over what the President does is at its zenith.

The typical case of presidential authority that derives directly from the Constitution lies in the field of national security. All of our classification of information in the executive branch—top secret, secret, classified—rests upon an executive order. An executive order establishes the intelligence community and assigns functions between the CIA, the National Security Council and otherwise.

Those have been viewed as inherent presidential powers.

It's not that they're unlimited. For instance, in the Youngstown Sheet & Tube case in 1952, the United States Supreme Court scolded Harry Truman for asserting he had inherent power to seize a steel mill during the Korean war on the theory that it threatened a shortage of steel that ultimately could endanger our troops in Korea—one of the only times in the history of the country where, during wartime, the United States Supreme Court displayed more robustness than supineness when it addressed presidential power.

But that's not the—that doesn't mean, in my judgment, however, that Congress has no role when the President asserts a constitutional power for his action. In the area of classified information, for instance, the United States Supreme Court, in EPA versus Mink in 1971, held that a classified document automatically was exempted from disclosure. Under the statute, there was no judicial review.

If it was classified, that's the end of the question.

Congress then amended the Freedom of Information Act 3 years later and said, well, we want to give judges authority to force disclosure of classified information that the judge concludes was wrongfully deemed confidential and created, if public, a danger to the national security or foreign policy interest of the United States.

I think it's generally accepted that Justice Jackson's concurring opinion in Youngstown Sheet & Tube, where he indicated if Congress seeks to confront by statute a direct exercise of presidential power, it may, in some sense, subtract from the President's constitutional authority to do things, in foreign affairs or otherwise. We don't know where that nebulous realm leads us because it very seldom happens that Congress takes on a President in these particular areas. The typical reaction has been acquiescence.

Even in cases like the War Powers Act, where the President has deemed the Act basically an ink blot for some 27 or 28 years now, Congress has typically done nothing, so whether or not its attempt there to try to control a President's use of military abroad is con-

stitutional has never been litigated.

Let me move quickly to the area of delegated power under statutes. There Congress, unlike is the case with typical agency delegations, ordinarily uses language that is rather broad in scope as to what the President may do. I think that's a fair description of the Antiquities Act of 1906. It does, it seems to me, not relieve the President, however, from oversight and checking. Under the 1906 Act with regard to the most recent controversial designation out in Utah, surely there is available judicial review. The President is not shielded under our jurisdictional statutes from lawsuits challenging whether or not he has exceeded statutory discretion in what he has

I remember when I was clerking, I sat and worked on a case where we held it was illegal for President Nixon to refuse to raise executive pay under the classification scheme that Congress drafted. What can be done, if I can run a little bit over my time here, Mr. Chairman—

Mr. BARR. Let me check and see what the floor schedule is. Okay, if you could take just one additional minute, and then we'll recess briefly so we can go vote. The gentleman is recognized for 1 minute.

Mr. Fein. One method of addressing the problem created by President Clinton's rather abrupt and unilateral assertions of authority, not only on the Antiquities Act but other statutes, is simply to make the Executive Office of the President an agency for purposes of the APA, which would require that there be extensive rulemaking, opportunity for comment and such, for any designation of land as qualifying as an antiquity or national monument was made.

There is also an opportunity for Congress to dictate that, in reviewing presidential action in courts, it shall be done de novo and not any special deference to the expertise or insight or prestige of the presidency. It's customary at present, under judicial review, that it's a very deferential standard.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN. ESQ., FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL AND CONSTITUTIONAL LAW EXPERT

Mr. Chairman and Members of the Subcommittee,

I am grateful for the opportunity to present legal and prudential views about presidential executive orders and various congressional options that might fortify the outstanding deterrents against abuses. Executive orders are of two types. Some find justification in the constitutional powers of the President. For instance, the pardon power and the amnesties proclaimed by Presidents Ford and Carter for Vietnam era draft evaders and deserters. The President also enjoys inherent national security powers. Thus, President Roosevelt proclaimed the odious executive orders for Japanese American concentration camps during World War II, which were sustained by the Supreme Court in the Hirabayashi and Korematsu decisions. President Truman created Loyalty Review Boards in 1947 by executive order. The entire system of classifying executive branch documents rests on an executive order. The international trade predecessor to the WTO, GATT, was a unilateral executive agreement made by President Truman in the wake of a congressional failure to ratify an international trade treaty.

Executive orders pivoting on the President's claimed constitutional authority, however, are not beyond judicial review. The Supreme Court thus invalidated President Truman's seizure of a steel mill during the Korean War in the Youngstown Sheet & Tube case. The High Court also upended President Lincoln's claimed authority to conduct military trials of civilians during the Civil War when civil courts were open and functioning in Ex Parte Milligan. Moreover, the Supreme Court has held that the President must obey outstanding executive orders, even when bottomed on the Constitution, until they are revoked. Additionally, Justice Robert Jackson's concurring opinion in Youngstown suggests that the Court will be less inclined to bless a claim of inherent presidential power if Congress acts directly against the assertion by statute than if it is either neutral or supportive. Finally, Congress is empowered to conduct oversight hearings of constitutional executive orders to explore either the need for a constitutional amendment or to inform the public of suspected abuses so voters may adjust their political loyalties accordingly, as illustrated by the congressional hearings reviewing President Clinton's less than exhilarating sayonara pardons.

Executive orders may also find justification in statutes, i.e., where Congress has delegated power to the President which he may exercise within the boundaries of the delegation. The President, for instance, adjusts federal civilian pay by executive order bottomed on a federal law. The President similarly administers the Helms-Burton law imposinig an embargo on Cuba by executive order. Ditto for the Antiquities Act of 1906. And the President by virtue of federal law is empowered by executive order to set standards for government contractors in furtherance of efficiency and cost savings. That is the foundation for the lengthy "affirmative action" executive

tive order applicable to government contractors that originated with President Ken-

nedy in 1961.

Executive orders that purport to rest on statutes can be customarily checked in three ways. The judiciary may hold them beyond the power delegated by Congress, as the U.S. Court of Appeals for the District of Columbia Circuit did in invalidating President Clinton's attempt to boycott government contractors who used permanent replacements to supplant striking employees. Congress by statute may override an executive order, as it did in part in requiring the public disclosure of classified information that the judiciary finds has been erroneously classified under the Freedom of Information Act. And, a succeeding president may revoke executive orders of his predecessors, except for the possibility that the congressional delegation foreclosed such second-guessing, which might plausibly be the case for reservations of public lands for some specific use and a revocation might wreak havoc on the status quo.

In my view, nothing in recent history makes executive orders more or less worrisome. They should be examined on a case-by-case basis to determine whether they make for enlightened public policy. Controversial orders are ordinarily more ques-

tions of politics than of law.

Let me suggest, nevertheless, areas for congressional exploration which might strengthen institutional checks against misuse of executive orders. With respect to presidential pardons, Congress might consider obligating the President to receive the views of the Attorney General and the Director of the FBI before making a decision. It might further require the President to desist from issuing a pardon unless the name of the individual under consideration had been published in the Federal Register at least two weeks before the decision, (absent a national security certification of a need for secrecy).

With respect to national security executive orders, Congress might consider an internal rule that brings them to a floor vote for approval or disapproval if 20 percent of the Members so demand (with no filibustering in the Senate) to put the legislature on record in case of litigation challenging their constitutionality, as Justice

Jackson's concurrence advises in Youngstown.

With respect to statutory executive orders, Congress might consider subjecting them to the notice and rule making requirements of the Administrative Procedure Act unless an express statutory exemption is created. It might also expressly stipulate that executive orders are subject to judicial review, absent a clear statutory exception, and that the judiciary should review such orders de novo with no special or other deference to the President, thus displacing the customary deferential Chevron standard announced by the Supreme Court in 1984.

Finally, Congress might consider requiring a 90 or 120 day delay in the effective date of statutory executive orders to permit a reasonable time for it to thwart the

action by new legislation, which, of course, would itself be subject to a veto.

As is true with all power, executive orders can be abused. The challenge of the congressional statesman is to discover that prudential blend of restraints and discretion that over the course of time will best advance our nation's ideals and aspirations.

### SUMMARY

Congress should consider requiring the President to receive advice from the Attorney General and Director of the FBI before issuing pardons or commutations and to publicize for at least two weeks in advance potential beneficiaries of clemency. Congress should consider internal rules enabling immediate floor votes on na-

Congress should consider internal rules enabling immediate floor votes on national security executive orders of the President to place its view of the President's constitutional authority in the event of litigation.

Congress should consider making statutory executive orders subject to the Administrative Procedure Act and judicial review de novo with no special deference to presidential judgments.

Congress should consider subjecting executive orders to a 90 or 120 day waiting period to enable it to enact repudiating legislation, which itself would be subject to a presidential veto.

Mr. BARR. Thank you very much, Mr. Fein.

With apologies to the witnesses, we have to break for three votes on the floor. It will probably take about 15 minutes, so we'll stand in recess until noon, or as soon as the last vote is over.

[Recess.]

Mr. BARR. The Subcommittee will be in order.

At this time, Mr. Gaziano, you are recognized for 5 minutes.

# STATEMENT OF TODD F. GAZIANO, SENIOR FELLOW IN LEGAL STUDIES AND DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION

Mr. GAZIANO. Thank you. Good morning, Mr. Chairman—or good afternoon I should say by now—and Members of the Subcommittee.

Thank you for this opportunity to testify.

In recent years there has been a renewed interest in the proper use and possible abuse of executive orders and presidential directives. As I don't need to inform you all, many citizens and lawmakers express grave concern over the content and scope of several

of Bill Clinton's executive orders and land proclamations.

Attached as an appendix to my written testimony is a Heritage Foundation legal memorandum we issued last month, titled "The Use and Abuse of Executive Orders and Other Presidential Directives", which is also available at our website. The 24 page memorandum provides a more detailed analysis of executive directives, including a discussion of the historical practice, sources of presidential authority, the legal framework of analysis, and some brief thoughts on reform proposal.

In my oral testimony today, I just want to touch on two, somewhat distinct areas. First is the constitutional framework of analysis that Bruce, to my left, already gave a fabulous overview of. I have heard people say that presidential use of executives orders

violates separation of powers.

Well, the separation of powers in our Constitution actually cuts both ways with regard to executive orders, proclamations and such. It reinforces the President's right or duty to issue a decree, order, proclamation, to carry out a particular power that truly is committed to his discretion by the Constitution or by lawful statute.

On the other hand, the constitutional separation of powers cuts the other way, if the President attempts to issue an order regarding a matter that is expressly committed to another branch of government. It might even violate the separation of powers and render the executive order/proclamation void. Thus, there is no simple recitation of the constitutional order and you've got to look at the application of the constitutional and statutory law in each case. But, in addition to the information in the legal memorandum that I authored, I would also be happy and eager to answer your question about the general framework.

Let me turn now, though, to recommendations that I might have for this Committee and for the rest of Congress on how to sort of

protect and defend some of your own prerogatives.

Let me start by saying, however, in the legal memorandum, we gave some advice to the current President on how he could correct some of the errors and abuses of the previous President in five substantive issue areas.

One of the areas we gave some advice to the President was on the land proclamations. We opine that the President could rescind the monuments that were improperly designated, and I would love to get into that, to provide answers to some of the questions that you had of Representative Hansen, and I would like to elaborate on what I think the President's authority is.

I also think it's, without doubt, that he can change the boundaries, reduce the acreage substantially, and he can change some of the restrictions for those monuments. The Secretary of Interior has made some statements that at least they would consider those other actions, even if they didn't rescind some of the proclamations.

But, rather than sort of waste the Subcommittee's time on what another branch of government or what the courts might do with regard to the three legal challenges to the Grand Staircase-Escalante monuments, I would like to make a few suggestions on what I think you all in Congress may want to do to fix the law. By the way, you can also rescind by legislation the monuments as well, but apart from that, fixing the law I think is something I know you are keenly aware of.

First, I think you should repeal or modify some of the statutory delegations that have been abused in the past and might be abused in the future. Of course, I think President Bush has shown that his example will be a good one. But let me suggest to you that that may create a perfect opportunity for you all to work with the President, who has no interest in abusing his prerogatives, to come to

a common understanding on changing some of these laws.

Let me use the Antiquities Act as an example, with some suggestions that I would like to see you all make. First, I think you all ought to change some of the language to narrow the kind of lands that could be designated under the Antiquities Act. But because some Presidents have shown that they are not going to be bound by such descriptive language that exists in the current standard—you know, the smallest acreage necessary language—I think you all ought to impose a limit. I think that that limit should be 5,000 acres, and I have four reasons why I think it should be 5,000 rather than 50,000 acres that I would be glad to elaborate on.

The second step that I would like to suggest for you all, and is elaborated a little bit more in my written testimony, is to consider some process reforms. Mr. Fein had some very good ideas, very creative ideas, two others that were contained in H.R. 2655 that was introduced by Representatives Ron Paul and Jack Metcalf last year, also I think are deserving of renewed attention, and that is that such declarations, executive orders, proclamations, should clearly state what the President's claim of authority is, because

many of Clinton's did not.

I think a faithful executive ought not mind stating what he thinks his constitutional authority is. For example, in the American Heritage Rivers Initiative, President Clinton did not specify what his authority was, and in hearings before this House it was clear that his claims were rather ephemeral.

There is also some ways that you could increase standing for some parties by removing some of the statutory barriers to people

bringing suit against the President.

The final suggestion I would make for you all is that I think you can encourage the President to institute internal reforms, and I would be glad to elaborate on what some of those internal reforms are. But sometimes reforms that the President makes in the process—For example, I used to work reviewing the President's executive orders, and I know that we followed executive orders to review the President's executive orders. Sometimes those kind of reforms are more longstanding and effective.

Thank you.

# [The prepared statement of Mr. Gaziano follows:]

PREPARED STATEMENT OF TODD F. GAZIANO, SENIOR FELLOW IN LEGAL STUDIES AND DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION  $^1$ 

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify today on executive orders and presidential directives.

For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. I also served in the U.S. Department of Justice, Office of Legal Counsel, during different periods in the Reagan, Bush, and Clinton Administrations, where I provided constitutional advice to the White House and four Attorneys General. Several years ago, I also was privileged to serve as chief counsel for another Subcommittee of this House.

In recent years, there has been renewed interest in the proper use and possible abuse of executive orders and other presidential directives. For example, many citizens and lawmakers expressed concern over the content and scope of several of President Bill Clinton's executive orders and land proclamations. And, in an exceedingly rare act, the courts reacted by striking down one of President Clinton's executive orders. Litigation to contest the validity of other directives is ongoing. Despite the increased public attention focused on executive orders and similar directives, public understanding regarding the legal foundation and proper uses of such presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion and occasional misunderstandings regarding the legality and appropriateness of various presidential actions.

Attached as an appendix to my testimony is a Heritage Foundation Legal Memorandum we issued last month on "The Use and Abuse of Executive Orders and Other Presidential Directives," which is also available at www.heritage.org. The twenty-four page memorandum provides a more detailed analysis of the President's use of executive directives, including a discussion of the historical practice, sources of presidential authority, the legal framework of analysis, and some brief thoughts on reform proposals.<sup>2</sup>

In my oral testimony, I would like to focus on two somewhat distinct areas. The first is the general constitutional framework for executive directives. The second is what Congress can do to reassert its prerogatives and make sure that the President does not usurp them.

### THE SEPARATION OF POWERS

One of the great and enduring gifts from the Founders' generation was the inclusion of separation of power principles in the United States Constitution. The Framers had studied the writings of Montesquieu and other political philosophers as well as the workings of the separate branches of their own state governments. Their conscious design to enforce this separation of functions was carefully explained in *The Federalist Papers* and during the debates over ratification of the United States Constitution. The separation of powers is now enshrined in both the structure of the Constitution and various explicit provisions of Articles I, II, and III.

Yet, in the previous Administration, a baser motive seemed to prevail in the use of executive power. Former President Bill Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. Moreover, he repeatedly flaunted his executive order power to curry favor with narrow or partisan special interests. History will show that President Clinton abused his authority in a variety of ways and that his disrespect for the rule of law was unprecedented. Given this pattern, no one should be surprised that President Clinton sometimes abused his executive order authority as well.

¹The Heritage Foundation is a public policy, research, and educational organization. It is privately supported, and receives no funds from any government at any level; nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2000, it had more than 150,297 individual, foundation, and corporate supporters representing every state. Its 1999 contributions came from the following sources: individuals (51.2%), foundations (17.0%), corporations (3.2%), investment income (25.9%), publication sales and other (2.7%). Staff of The Heritage Foundation testify as individuals. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

<sup>&</sup>lt;sup>2</sup> Although I was the principal author of the memorandum, the review of President Clinton's executive orders and proclamations was a collaborative effort involving others at Heritage.

A President who abuses his executive order authority undermines the constitutional separation of powers and may even violate it. But the constitutional separation of powers supports both sides of the argument over a President's proper authority. It reinforces a President's right or duty to issue a decree, order, or proclamation to carry out a particular power that truly is committed to his discretion by the Constitution or by a lawful statute passed by Congress. On the other hand, the constitutional separation of powers cuts the other way if the President attempts to issue an order regarding a matter that is expressly committed to another branch of government; it might even render the presidential action void. Finally, separation of powers principles may be unclear or ambiguous when the power is shared by two branches of government.

Thus, no simple recitation of governing law or prudential guidelines is possible. However, history and practice are useful tools in understanding the President's authority, and a legal framework of analysis exists to help determine issues of validity. In addition to the information in our memorandum, I would be happy to answer the Members' questions on these matters.

#### RECOMMENDATIONS FOR CONGRESS

In the attached Heritage Legal Memorandum, we provided our thoughts on some priorities for the current President to correct the errors and abuses of the previous President in five issue areas: foreign and defense policy, environmental policy, regulatory review, labor policy, and civil rights. For example, President Clinton's land designations under the Antiquities Act were improper and many, if not most, were probably illegal. We opined that the President probably could rescind those that were improper. In addition, he can change the boundaries of the monuments, significantly reduce the acreage involved, and alter the restrictions for portions of the monument lands.

Whether some of these lands should be protected or not, it would be best in my view if President Bush rescinded the monument designations with a message to Congress that he would be happy to sign legislation that Congress sent to him regarding such lands. That said, it is probably not the best use of the Subcommittee's time to hear me talk about what I think a different branch of government should do, whether it is the executive branch or the courts. Regardless of what President Bush does to restore faith in the Office of the President—and I think President Bush has taken some very positive steps in the area of executive orders—Congress should take the following steps to prevent future abuses and protect its prerogatives:

First, Congress should modify or repeal the statutory delegations of power that Congress has granted to the President which have been abused or may be abused in the future. Let me stress that I have no reason to suspect that President Bush would abuse his authority. He has shown every indication that his example will be a good one. Yet, this very fact suggests there is a satisfactory basis for Congress to work with the executive branch to review some of these grants of authority and reach an agreement on possible legislative changes.

For example, Congress did not significantly amend the Antiquities Act of 1906 when it revised many land management laws during the 1970s. Presidents Ford, Reagan, and George H.W. Bush did not make any monument designations under the Antiquities Act, but Presidents Carter and Clinton abused their authority to remove millions of acres of land from public use. Thus, I would recommend that Congress revise the type of land that can be designated as a monument under the Antiquities Act. More importantly, however, I think Congress should tighten up the language that requires monuments to be "the smallest area compatible with the proper care and management of the objects to be protected." Because some Presidents have shown no intention of being limited by such descriptive words, I also recommend that Congress limit the amount of land that can be designated under the Antiquities Act without additional statutory authority to something like 5,000 acres.

The President could seek a waiver from such an acreage limitation if it were necessary, and there are other laws that can be used to designate national parks, wild and scenic waters, etc. But it is unclear to me why Congress would want the President to have unilateral power to lock away tens of millions of acres of land as a national monument but it would not grant the President equivalent authority to make the same land a national reserve or park. Consistency may be the hobgoblin of little minds, but it should not be dismissed out of hand when someone points out that it is lacking.

The International Emergency Economic Powers Act (IEEPA) was intended to limit the President's emergency powers during peace time. The era since IEEPA's passage has witnessed an improvement upon earlier abuses, but IEEPA has still spawned "multiple concurrent states of national emergency," to quote one scholar. Although some of the authority granted to the President may be necessary in a true national emergency, I believe Congress should reassess the standards and threshold for a

declaration of national emergency in that Act.

A second step Congress can take is further consideration of some of the process reforms contained in such bills as H.R. 2655, the Separation of Powers Restoration Act, which was introduced in the last Congress by Representatives Ron Paul (R-TX) and Jack Metcalf (R-WA). H.R. 2655 would have required that all presidential directives specify the constitutional and statutory basis for any action incorporated in the directive or be void as to parties outside the executive branch. With few exceptions, most recent Presidents before Clinton did cite the font of their authority in their executive directives. President Clinton cited some authority in a majority of his directives, but others were vague or had no citation of authority at all. A faithful executive should not have a problem citing the authority for his actions, and this requirement would help citizens, lawyers, and the courts evaluate new directives. Although there may be some constitutional problems with the application of this requirement in some cases, it is worth further consideration and possible refinement. H.R. 2655 also would have attempted to expand the number of parties with stand-

H.R. 2655 also would have attempted to expand the number of parties with standing to challenge an arguably unlawful directive, including Members of Congress, state and local officials, and any aggrieved person. Because part of the standing doctrine is constitutional, a statute could not automatically confer standing on someone without a "particularized" injury in fact. Nevertheless, the provision would potentially expand the range and number of persons who could bring suit to challenge

a questionable directive by removing any statutory impediments to suit.

Finally, I think Congress should encourage the President to institute internal reforms, including those that are designed to address past congressional concerns. Such institutional reforms tend to have a more lasting effect than many statutory reforms, perhaps in part because executive branch officials are directly answerable to the President and perhaps also because they are instituted with more flexibility or sensitivity to the needs of future Presidents. Thus, it makes sense for a new President to follow tradition but also to consider, in time, proposals to improve the process by which executive directives are issued.



No. 2 February 21, 200

# THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES

TODD F. GAZIANO<sup>1</sup>

In recent years, there has been renewed interest in the use and abuse of executive orders and other presidential directives. Many citizens and lawmakers expressed concern over the content and scope of several of President Bill Clinton's executive orders and land proclamations. Congress responded with hearings and the consideration of several bills designed to curb the President's authority to issue such directives. In an exceedingly rare act, the courts even reacted by striking down one of President Clinton's executive orders.

Despite the increased public attention focused on executive orders and similar directives, public understanding regarding the legal foundation and proper uses of such presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion or misunderstanding regarding the appropriateness of various presidential actions. The accompanying legal memorandum provides an overview of the President's use of executive directives, including a discussion of the historical practice, sources of presidential authority, the legal framework of analysis, and proposals to prevent abuses.

From the founding of our nation, American Presidents have developed and used various types

of presidential "directives." The bestknown directives are executive orders and presidential proclamations, but many other documents have a similar function and effect. Reduced to their common core, presidential directives are simply written, rather than oral. instructions or declarations issued by the President. Authority for these directives

Produced by The Center for Legal and Judicial Studies

Published by The Heritage Foundation 214 Massachusetts Ave., N.E. Washington, D.C. 20002–4999 (202) 546-4400 http://www.heritage.org



This paper, in its entirety, can be found at: www.herltage.org/library/
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must come from either the Constitution or statutory delegations.

Yet the President's authority to issue directives goes beyond express language in the Constitution or statutes that grant him such power. He pos-

The review of President Clinton's proclamations was a collaborative effort by several scholars at The Heritage Foundation, including substantial contributions by Angela Antonelli, Dan Fisk, Mark Wilson, and Christopher Summers.



sesses additional authority to issue directives where that is the reasonable implication of the power granted (implied authority) or if it is inherent in the nature of the power conferred (inherent authority). The Constitution vests the President with the duties of commander in chief, head of state, chief law enforcement officer, and head of the executive branch. When the President is lawfully exercising one of these responsibilities conferred by Article II of the Constitution, the scope of his power to issue written directives is especially broad, and Congress has little ability to regulate or circumscribe the President's use of written directives.

Nevertheless, the President's power to issue executive decrees is limited—by the scope of his powers and by other authority granted to Congress. If the President's authority is derived from a statutory grant of power, Congress remains free to negate or modify the underlying authority. Congress also has some latitude in defining the procedures the President must undertake in the exercise of that authority, although there are some constitutional limits to Congress's power to micromanage the President's enforcement or decision-making procedures.

Because the constitutional separation of powers both supports and limits a President's power to issue executive directives, it is natural that some friction exists in the exercise of that power. Over the past 60 years, presidential authority to issue certain decrees has been tested in court (although many executive directives remain difficult to challenge in court), and a legal framework of analysis for the legitimacy of this power has evolved. The interplay between Congress and the White House varies depending on the aggressiveness of the President and Congress's reaction to it.

During the previous Administration, President Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. Moreover, he repeatedly flaunted his executive order power to curry favor with narrow or partisan special interests. A review of Clinton's executive orders shows that the number issued by him is not significantly different from the number issued by Presidents Ronald Reagan or George H. W. Bush. Yet the true measure of abuse is not the overall number of directives, but whether any of them were illegal or improper, and if so, how significant they may have been.

A review of President Clinton's directives also reveals some important departures from the practices of his two predecessors. This is particularly true of his use (and abuse) of powers under the Antiquities Act of 1906 and numerous directives issued in the areas of foreign and defense policy, environmental policy, regulatory review, labor policy, and civil rights. A disproportionate number of these executive directives were either illegal or issued in the furtherance of an improper policy or political objective. One of President George W. Bush's priorities should be to review, revise, or rescind the most troublesome of these.

Predictably, the 106th Congress considered several measures designed to rein in the past President's abuses. H.R. 2655 attempted, in part, to define presidential directives more precisely and to require that all executive decrees specify the constitutional and statutory basis for any action incorporated in such directives. Both of these provisions are worthy of further consideration. Yet provisions of other bills were problematic and might be unconstitutional in application. Internal reforms initiated by the President may have a more lasting effect and are often more workable. Because few reforms can be imposed on a President over his veto, it makes sense for Congress to work with the new President on such reforms rather than overreact to the abuses of the last President.

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No. 2

February 21, 2001

# THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES

TODD F. GAZIANO

In recent years, there has been renewed interest in the proper use and possible abuse of executive orders and other presidential directives. Many citizens and lawmakers expressed concern over the content and scope of several of President Bill Clinton's executive orders and land proclamations. Congress responded with hearings and the consideration of several bills designed to curb the Presidents authority to issue such directives. In an exceedingly rare act, the courts reacted by striking down one of President Clinton's executive orders, and litigation to contest the validity of other directives is ongoing.

Despite the increased public attention focused on executive orders and similar directives, public understanding regarding the legal foundation and proper uses of such presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion and occasional misunderstandings regarding the legality and appropriateness of various presidential actions. This legal memorandum provides a general overview of the Presidents use of executive directives, including a discussion of the historical practice, the sources of presidential authority, the legal framework of analysis, and reform proposals related to the use and abuse of presidential directives.

## THE SEPARATION OF POWERS

"There can be no liberty where the legislative and executive powers are united in the same person." —Charles-Louis de Secondat, Baron de Montesquieu<sup>1</sup>

"The accumulation of all power, legislative, executive, and judiciary in the same hands...may in Produced by The Center for Legal and Judicial Studies

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same hands...may justly be pronounced the very definition of tyranny." —James Madison, Federalist 46

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

—U.S. Constitution, Art. 1, § I



"The executive power shall be vested in a President of the United States of America."
—U.S. Constitution, Art. II, § 1, cl. 1

One of the great and enduring gifts from the Founders' generation was the inclusion of separation of power principles in the United States Constitution. The Framers had studied the writings of Montesquieu and other political philosophers as well as the workings of the separate branches of their own state governments. Their conscious design to enforce this separation of functions was carefully explained in *The Federalist Papers* and during the debates over ratification of the United States Constitution. The separation of powers is now enshrined in both the structure of the Constitution and various explicit provisions of Articles I, II, and III.

Yet, in the previous Administration, a baser motive seemed to prevail in the use of executive power. Former President Bill Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. Moreover, he repeatedly flaunted his executive order power to curry favor with narrow or partisan special interests. If this were not enough, Clinton's top White House political advisers made public statements about his use of executive decrees that were designed to incite a partisan response, saying, for example, that the power was "cool" and promising that he would wield that power to the very end of his term.<sup>2</sup>

A President who abuses his executive order authority undermines the constitutional separation of powers and may even violate it. History will show that President Clinton abused his authority in a variety of ways and that his disrespect for the rule of law was unprecedented. Given this pattern, no one should be surprised that President Clinton sometimes abused his executive order authority as well. But it would be a mistake to try to restrict a President's lawful and proper

executive order authority because of one abusive President.

Moreover, defenders of executive authority will find much in President Clinton's use of executive orders and proclamations that is instructive—even if they dispute the lawfulness or policy goals of the individual decrees. In short, some helpful lessons can be learned from recent experience about how an aggressive President can use his power for appropriate and beneficial purposes, and these lessons can help guide the current and future Presidents of the United States in making executive decisions.

In the end, the constitutional separation of powers supports both sides of the argument over a President's proper authority. It reinforces a President's right or duty to issue a decree, order, or proclamation to carry out a particular power that truly is committed to his discretion by the Constitution or by a lawful statute passed by Congress. On the other hand, the constitutional separation of powers cuts the other way if the President attempts to issue an order regarding a matter that is expressly committed to another branch of government; it might even render the presidential action void. Finally, separation of powers principles may be unclear or ambiguous when the power is shared by two branches of government.

Thus, no simple recitation of governing law or prudential guidelines is possible. However, history and practice are useful tools in understanding the President's authority, and a legal framework of analysis exists to help determine issues of validity. Beyond questions of legality, there are many separate but important issues of policy. Two broad policy questions present themselves: (1) whether a given power the President possesses ought to be used to advance a particular policy objective, and (2) whether a particular draft directive effectively advances such a policy goal.

Paul Begala flippantly remarked, "Stroke of the pen. Law of the land. Kind of cool." See James Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," The New York Times, July 5, 1998, p. 10. Bruce Reed threatened that "This President [Clinton] will be signing executive orders right up until the morning of January 20, 2001." See Marc Lacey, "Blocked by Congress, Clinton Wields a Pen," The New York Times, July 5, 2000, p. 13. This promise President Clinton kept.



# **DEFINING PRESIDENTIAL DIRECTIVES**

In order to place these issues of legality and policy in their proper context, it is important to start with an understanding of the nature and historical usage of such executive decrees.

From the founding of this nation, American Presidents have developed and used various types of presidential or executive "directives." The best known directives are executive orders and presidential proclamations, but many other documents have a similar function and effect. Reduced to their common core, presidential directives simply are written, rather than oral, instructions or declarations issued by the President. Because we would not expect or want the President to limit himself solely to oral instructions and declarations, it is not surprising that every President has used written directives to run the executive branch of government.

#### **Early Presidential Directives**

On June 8, 1789, three months after he was sworn in as President of the United States, George Washington sent an instruction to the holdover officers of the Confederation government asking each of them to prepare a report "to impress me with a full, precise, and distinct general idea of the affairs of the United States" that they each handled. Although the term "executive order" was not used until 1862, President Washington's instruction was the precursor of the executive order and was unquestionably proper. Every chief executive has the inherent power to order subordinates to prepare reports for him on the performance of their duties. The United States

Constitution expressly provides that the President may require his principal officers to prepare such reports.<sup>4</sup>

A few months later, a joint committee of Congress requested that President Washington "recommend to the people of the United States a day of public thanksgiving." On October 3, 1789, President Washington responded with a proclamation urging the people to recognize Thursday, November 26, 1789, as the day of thanksgiving. 6 Heads of state had issued proclamations commemorating victorious battles and national holidays for centuries, and there was no reason for Congress or the President to conclude that the Constitution removed this ceremonial function from our head of state. Congress may go farther than the President and pass laws fixing a particular holiday and granting paid leave to federal employees, but the President is free in the absence of congressional action to recommend such celebrations as he sees

Executive orders also have been used to direct foreign policy since the presidency of George Washington, when he issued a proclamation in 1793 stating that the United States would be "friendly and impartial toward the belligerent powers" of Britain and France. In this "Neutrality Proclamation," Washington justified his power to issue such a statement based on the "law of nations," but a firmer ground would have been the constitutional powers vested in the President over foreign affairs. Washington, with the concurrence of Secretary of State Thomas Jefferson and Secretary of the Treasury Alexander Hamilton, did not convene the Congress to debate the proclamation

- 3 Harold C. Relyea, Presidential Directives: Background and Overview, Congressional Research Service, CRS Report for Congress No. 98–611 GOV, July 16, 1998, p. 1, citing John C. Fitzpatrick, ed., The Writings of George Washington, Vol. 80 (Washington, D.C.: U.S. Government Printing Office, 1939), pp. 343–344.
- 4. U.S. Const., Art. II, § 2, cl. 1 ("The president...may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective office."). It could be argued that by expressly granting this power to the President with respect to principal officers, the Framers meant to deny this power with respect to inferior officers, but the rest of the clause and the drafting history suggest that this is not a plausible interpretation. Rather, it was meant to clarify that even principal officers, who are always confirmed by the Senate, were nevertheless subject to the President's control.
- 5. Annals of Congress, Vol. 1, September 25, 1789, pp. 88, 914-915.
- 6. Relyea, Presidential Directives, at 1.

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before issuing it. James Madison, among others, criticized Washington's proclamation as an overextension of executive authority and an infringement on Congress's authority to decide issues of war and peace. Congress later gave approval to Washington's course of action by passing the Neutrality Act of 1794, at Washington's request, giving the President the power to prosecute violators of the proclamation. However, this early episode demonstrates that the President and Congress may have overlapping responsibilities, and in such situations, the scope of the President's power to act unilaterally is sometimes unclear.

#### **Sources of Presidential Authority**

Although President Washington's Thanksgiving Proclamation was hortatory, other proclamations or orders communicate presidential decisions that have a legally binding effect. Authority for these directives must come from either the Constitution or statutory delegations.

On August 7, 1794, President Washington issued a proclamation ordering those engaged in the Whiskey Rebellion to disperse and calling forth the militia to put down the rebellion. This proclamation was issued pursuant to statutory authority delegated to the President. The statute provided that the President first had to warn citizens to disperse and return to their homes, but that he could call forth the militia to deal with any individuals who did not follow this command. Thus, the Whiskey Rebellion Proclamation may have been the first directive issued pursuant to power conferred by Congress.

On December 25, 1868, President Andrew Johnson issued a proclamation (the "Christmas

Proclamation") pardoning "all and every person who directly or indirectly participated in the late insurrection or rebellion" related to the Civil War. President Johnson's Christmas Proclamation was grounded squarely on his constitutional pardon power. <sup>10</sup> The Supreme Court subsequently ruled that the proclamation was "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect. <sup>11</sup>

As the Christmas Proclamation demonstrates, the President's authority to issue written directives is not limited to express language in the Constitution that grants him power to issue such directives. The President possesses additional authority to issue directives where that is the reasonable implication of the power granted (implied authority) or if it is inherent in the nature of the power conferred (inherent authority). The term "Commander in Chief of the Army and Navy" (as used in Article II of the Constitution) necessarily implies that the commander can issue oral and written commands, and it is inherent in the nature of a military commander that he do so.

If the President's authority is implied or inherent in a statutory grant of power, Congress remains free to negate or modify the underlying authority. Congress also has some latitude in defining or refining the procedures the President must take in the exercise of that authority, although there are some constitutional limits to Congress's power to micromanage executive branch decision-making procedures. <sup>12</sup>

When the President is exercising powers inherent in Article II of the Constitution, Congress has much less ability to regulate or circumscribe the

- 7. Ibid., at 13.
- 8. See 1 Stat. 264-265.
- William J. Olson and Alan Woll, "Executive Orders and National Emergencies," Cato Institute Policy Analysis No. 358, October 28, 1999, p.: 9.
- 10. U.S. Const., Art. II, § 2, cl. 1 ("The President...shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.").
- 11. Armstrong v. United States, 80 U.S. 154, 156 (1871).
- 12. See, e.g., United States v. Nixon, 418 U.S. 683, 705–713 (1974) (recognizing constitutional protections for the executive branch deliberative process); In re: Sealed Case, 121 E3d 729, 743 (D.C. Cir. 1997) (same).



President's use of written directives. Some of President Clinton's claims of implied and inherent authority were outrageous. <sup>13</sup> The U.S. Court of Appeals for the District of Columbia Circuit struck down one of his executive orders that was based on such an overly broad claim, <sup>14</sup> demonstrating that a President's claim that he is exercising inherent constitutional power will not always prevail. But when the President really is exercising a legitimate constitutional power—for example, his authority as Commander in Chief—Congress and the courts have little or no say in how the President communicates his commands.

### **Legitimate Uses of Presidential Directives**

As the foregoing discussion suggests, there are many legitimate uses of presidential directives. The following functions of the President expressly mentioned in the U.S. Constitution are among the more important under which the President may issue at least some directives in the exercise of his constitutional and statutorily delegated powers:

- Commander in Chief. 15 The President's power
  as Commander in Chief is limited by other
  constitutional powers granted to Congress,
  such as the power to declare war, raise and
  support the armed forces, make rules (i.e.,
  laws) for the regulation of the armed forces,
  and provide for calling forth the militia of the
  several states. However, the President's power
  as military commander is still very broad with
  respect to the armed forces at his disposal,
  including some situations in which Congress
  has not acted to declare war.
- Head of State. <sup>16</sup> The President is solely responsible for carrying out foreign policy, which

- includes the sole power to recognize foreign governments, receive foreign ambassadors, and negotiate treaties. Congress may enact laws affecting foreign policy, and two-thirds of the Senate must ratify any treaty before it becomes binding law, but Congress must still leave the execution of foreign policy and diplomatic relations to the President.
- Chief Law Enforcement Officer. The President has the sole constitutional obligation to "take care that the laws be faithfully executed," <sup>17</sup> and this grants him broad discretion over federal law enforcement decisions. He has not only the power, but also the responsibility to see that the Constitution and laws are interpreted correctly. <sup>18</sup> In addition, the President has absolute prosecutorial discretion in declining to bring criminal indictments. As in the exercise of any other constitutional power, one may argue that a particular President is "abusing his discretion," but even in such a case, he cannot be compelled to prosecute any criminal charges.
- Head of the Executive Branch. The Framers debated and rejected the creation of a plural executive. They selected a "unitary executive" and determined that he alone would be vested with "[t]he executive power" of Article II. After much debate, the Framers also determined that the President would nominate and appoint (with the Senate's consent in some cases) all officers in the executive branch. With very few exceptions, all appointed officials who work in the executive branch serve at the will and pleasure of the President, even if Congress has specified a term of years for a particu-

<sup>13.</sup> See infra, "The Legal Framework of Analysis."

<sup>14.</sup> U.S. Chamber of Commerce v. Reich, 74 E3d 1322, 1332-1337 (D.C. Cir. 1996).

<sup>15.</sup> U.S. Const., Art. II, § 2, cl. 1

<sup>16.</sup> U.S. Const., Art. II, § 2, cl. 2, and § 3.

<sup>17.</sup> U.S. Const., Art. H. § 3

<sup>18.</sup> Myers v. United States, 272 U.S. 52, 164 (1926); Public Citizen v. Burke, 843 E2d 1473, 1477 (D.C. Cir. 1988) ("[T]he incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretation of statutes."). See, generally, Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 Cardozo L. Rev. 201 (1993).

lar office.  $^{19}$  All of this was designed to ensure the President's control over officials in the executive branch $^{20}$  and to promote "energy in the executive."  $^{21}$ 

When the President is *lawfully* exercising one of these functions, <sup>22</sup> the scope of his power to issue written directives is exceedingly broad. In short, he may issue or execute whatever written directives, orders, guidelines (such as prosecutorial guidelines or nondiscriminatory enforcement policies), communiqués, dispatches, or other instructions he deems appropriate.

The President also may issue directives in the exercise of his statutorily delegated authority, unless Congress has specified in law that the statutory power may be exercised only in a particular way. A few examples of Congress's conditional grant of statutory authority are mentioned herein, but as previously explained, there are limits to how far Congress can go in an attempt to micromanage even the President's statutorily delegated authority. For example, Congress can grant the President (or his Attorney General) the authority to deport certain illegal aliens, but it cannot attempt to retain a veto over the final decision as it tried to do in the Immigration and Nationality Act. <sup>24</sup>

In sum, a President has broad discretion to use written directives when he is lawfully exercising one of his constitutional or statutorily delegated powers. Any broad power or discretion can be abused, but it would be wrong to confuse such potential or real abuse with the many legitimate uses.

#### THE LEGAL FRAMEWORK OF ANALYSIS

President Abraham Lincoln used presidential directives to run the early months of the Civil War, presenting Congress with the decision either to adopt his practices as legislation or to cut off support for the Union army. Within his first two months in office, on April 15, 1861, Lincoln issued a proclamation activating troops to defeat the Southern rebellion and for Congress to convene on July 4. He also issued proclamations to procure warships and to expand the size of the military; in both cases, the proclamations provided for payment to be advanced from the Treasury without congressional approval. These latter actions were probably unconstitutional, but Congress acquiesced in the face of wartime contingencies, and the matters were never challenged in

- 19. For a detailed discussion of the President's power to fire executive branch officers at will, see Myers v. United States, 272 U.S. 52 (1926). The majority opinion in Myers was written by the only person (William Howard Taft) to be both a Justice of the Supreme Court and President. But see also Morrison v. Olson, 487 U.S. 65+ (1988) (recognizing one of the rare exceptions to at-will dismissals for independent counsels in the now expired Ethics in Government Act). I believe that Morrison was wrongly decided and that this rare exception should not exist, but a detailed discussion of this area of constitutional law is beyond the scope of this memorandum.
- 20. See Myers, supra, 272 U.S. at 135–164. The Court explained that the President must "supervise and guide" executive officers and exert largely unfettered "general administrative control [over] those executing the laws." Congress sometimes operates under the mistaken view that by vesting statutory authority in an agency head, it can insulate the implementation decisions from presidential control. Except for the erroneous exception carved out in Morrison (see note above), this view of agency autonomy simply cannot withstand constitutional scrutiny.
- 21. Federalist No. 70 ("Energy in the executive is a leading character in the definition of good government.").
- 22. The legal framework for determining whether the President's directives or actions are substantively lawful is discussed infra.
- 23. For a thoughtful discussion of what Congress can and cannot do to limit the President's executive order powers, see testimony of Douglas R. Cox, Principal Deputy Assistant Attorney General, U.S. Department of Justice, 1992–1993, before the Subcommittee on the Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, 106th Cong., 2nd Sess., October 27, 1999.
- 24. L.N.S. v. Chadha, 462 U.S. 919 (1983) (holding that Congress's attempt to retain a veto over the statutory discretion of the executive branch violated the constitutional separation of powers).

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During his time in office, President Franklin Roosevelt greatly expanded the use of executive orders, partly in response to the growth of government and partly in response to the demands placed on him as Commander in Chief during World War II. Unfortunately, FDR also showed a tendency to abuse his executive order authority and claim powers that were not conferred on him in the Constitution or by statute. <sup>25</sup> President Harry Truman followed this pattern of governing by executive order. Some of President Truman's executive orders were to his credit, such as the integration of the armed forces, <sup>26</sup> and some were to his shame, such as the attempted seizure of the steel industry during the Korean conflict. <sup>27</sup>

The Supreme Court's opinion in the "Steel Seizure Case" striking down Truman's executive order, <sup>28</sup> as well as subsequent practice, helped create a workable understanding regarding when a President's executive order authority is and is not valid. A slight modification of Justice Robert Jackson's famous framework of analysis is as follows: The President's authority (to act or issue an executive order) is at its apex when his action is based on an express grant of power in the Constitution, in a statute, or both. His action is the most questionable when there is no grant of constitutional authority to him (express or inherent) and his action is contrary to a statute or provision of the Constitution. Although this framework of analysis

is a helpful starting point, a deeper understanding still requires a substantive knowledge of the relevant statutory law and a President's and Congress's constitutional powers.

For example, a careful review of the substantive law shows why President Truman's desegregation of the armed forces was proper notwithstanding Congress's constitutional authority regarding the military. Congress has the power to create or abolish the military forces, and it has the power to "make Rules for the Government and Regulation" of the military. Of the military, of the military including the Uniform Code of Military Justice. Congress's constitutional power permits it to establish standards for the induction of soldiers, including height, weight, and age restrictions. When Congress has acted pursuant to its constitutional authority and its act does not violate any other provision of the Constitution, its rules govern who shall serve in the military, what their pay and retirement age shall be, etc.

But when President Truman desegregated the armed forces, he was not interfering with any congressional power over induction or any military rules of conduct. <sup>30</sup> President Truman exercised his authority as Commander in Chief to assign individual soldiers lawfully in his command to units that he deemed appropriate. Truman also had a constitutional duty to stop government racial discrimination. <sup>31</sup> Thus, even if Congress wanted to override the desegregation order, it possessed no

- 26. E.O. No. 9981.
- 27. E.O. No. 10340.
- 28. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
- 29. U.S. Const., Art. I, § 8, cls. 12-15.
- 30. The constitutional grants of authority to Congress mentioned above, however, are more relevant to the question of whether a President may permit openly homosexual soldiers to enlist in the military if that were contrary to a congressional enactment. That question is beyond the scope of this memorandum, but under current law, the legal analysis under Articles I and II and the Fourteenth Amendment of the Constitution would be quite different from that regarding desegregation of those soldiers lawfully serving in the armed forces.

<sup>25.</sup> For example, Executive Order (E.O.) No. 9066 authorized the military internment of many Japanese–Americans during World War II. The Supreme Court upheld this executive order, based in part on the discretion the Court gave to the Commander in Chief. Some scholars cite the Court's opinion as proof that the internment was constitutional. Nevertheless, I submit that the Supreme Court was wrong (whereas deportation of certain non-citizens and non-permanent alien residents may have been legal if they were accorded due process of law). In any event, the order certainly reflects an extreme and unprecedented claim of authority over the lives of ordinary Americans based on a tenuous link to the President's inherent military authority.

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authority to tell the President how to detail or utilize the soldiers already in his command, and the President had an obligation to end racial discrimination. This example demonstrates that an application of the legal framework requires careful attention to the underlying constitutional and statutory powers of each branch.

There may be close cases in which the validity of the executive order is uncertain, such as when a claim of inherent constitutional authority is arguable and where Congress has been silent or its will is unclear. Nevertheless, Presidents since Truman were generally more careful to stay within their constitutional and statutory grants of authority in the exercise of their executive order authorityuntil the Administration of President Clinton. Although the number of illegal executive orders issued by President Clinton does not constitute a large percentage of his total of 364, the pattern of illegal orders, often without any claim of statutory or constitutional authority, is still striking. The clearest example was Clinton's "striker replacement" executive order. The legal decision it spawned provides additional guidance in determining the legality of future executive orders and thus is worthy of a brief discussion.

In 1993, President Clinton urged Congress to enact a statute that would prohibit employers from hiring permanent replacements for workers who are on strike. The right to hire such permanent replacement workers was firmly established in the National Labor Relations Act (NLRA) and in decisions of the U.S. Supreme Court. Congress refused to authorize the change in law in 1993–1994. Shortly after Republicans gained control of Congress in 1995, the President issued Executive Order 12954 in an attempt to achieve through executive fiat what he could not achieve through legislation. Clinton claimed authority under the

Federal Property and Administrative Services Act (the "Procurement 'Act")<sup>32</sup> to require all large government contractors, which employed roughly 22 percent of the labor force, to agree not to hire permanent replacements for lawfully striking employees.

The United States Court of Appeals for the District of Columbia Circuit unanimously overturned the executive order and the implementing regulations that had been issued by the Secretary of Labor 33 The court first determined that it had jurisdiction over the case despite what the court described as President Clinton's "breathtakingly broad claim of non-reviewability of presidential actions." In short, the court said that it did not have to defer to the President's claim that he was acting pursuant to lawful authority under the Procurement Act. On the merits, the court ruled that since the NLRA "undoubtedly" grants an employer the right to hire permanent replacements for striking workers, it would not read the general purposes of the Procurement Act as trumping this specific right of employers. The court distinguished Executive Order 11246 (which guaranteed equal employment opportunities) and Executive Order 12092 (which restricted wage increases for government contractors) as not being in conflict with any other statute.

The striker replacement case stands for the seemingly obvious proposition that the President may not use his statutory discretion in one area to override a right or duty established in another law. As a legal matter, however, it does not stand for the proposition that the President may not use his statutory discretion in one area to advance other lawful policy goals. Whether it is wise to do so is a separate question. Some thoughtful people have argued that a President ought not to use his procurement power or similar administrative discre-

<sup>31.</sup> The Supreme Court has determined that this constitutional command applies to the federal government even though the Fourteenth Amendment's equal protection clause prohibits only state discrimination. Although some still question the proper font of this constitutional obligation, it is now well-established in precedent that the federal government is equally bound by the same nondiscrimination principle.

<sup>32. 40</sup> U.S.C. §§ 471–514

The implementing regulations were "Permanent Replacement of Lawfully Striking Employees by Federal Contractors," Federal Register, Vol. 60 (1995), p. 27856.



Categories of Executive Orders and Proclamations	
Categories	Examples
Legal	Most government reorganization orders; most presidential study commissions
lllegal and Improper	Clinton's "striker replacemnt" order, the American Heritage River Initiative; the Clinton directive regarding Adarand not to end unconstitutional racial preference programs
Improper (possibly illegal)	Clinton's designation of "monuments" under the Antiquities Act (possibly illegal in scope or if done for an illegal purpose)

tion to promote unrelated policy goals, but that is a political and prudential matter about which reasonable people can differ.

#### Lawful Orders, Bad Policy

A narrow focus on illegal executive orders, however, would not include many arguably legal orders that are still highly improper as a matter of policy. This distinction between illegal and improper executive orders is important for a variety of reasons. While almost all of President Clinton's illegal executive orders were in furtherance of an improper policy or political objective, many of the most objectionable are within the outer bounds of what is legal. President Bush should carefully review and rescind or revise both types of "bad" executive orders, but his legal duty and his policy options in doing so might be affected by this distinction. Thus, it is helpful to keep the various categories of executive orders and proclamations in mind (see Table 1).

In addition to the legal evaluation, two broad questions mentioned earlier may help guide the policy evaluation: (1) whether a given power the President possesses ought to be used to advance a particular policy objective, and (2) whether a particular draft directive effectively or appropriately advances such a policy goal. The first question raises issues of precedent and macro-policy; the second raises issues of drafting and prudence.

#### Types of Presidential Directives

Most presidential directives fit into one of two functional categories represented by the two types of directives issued by President Washington in 1789. <sup>34</sup> One broad category includes documents with written instructions from the President to executive branch officials on how they are to carry out their duties. Most executive orders fall into this category. Another category includes written statements that communicate a presidential decision or declaration to a broad group of people that might include government officials, the general public, or even foreign governments. Most presidential proclamations fall into this second category.

Not much turns on even this distinction, however, because different types of directives can have the same effect. Some statutes delegating authority to the President provide that he must exercise that authority by issuing a particular type of directive—such as an executive order or a proclamation. But there is no statute or other authority that defines different presidential directives or distinguishes one type from another. Apart from tradition, historical usage, and a few words common to each device (such as the title), there are no rules regarding the substance of each directive. In short, a President can comply with a statute that requires him to make a particular statutory determination by proclamation simply by placing the word

<sup>34.</sup> As explained below, this categorization may provide a better understanding of the uses and functions of presidential directives, but it does not follow from any particular legal distinction.



"Proclamation" at the top of the document and using a phrase like "it is hereby proclaimed" somewhere in the text before the determination.

The distinction between executive orders and proclamations was even less clear in other eras. President Abraham Lincoln directed much of the early Civil War by proclamation, including calling forth the militia. Calling forth the militia is now typically accomplished by executive order.35 1862, President Lincoln issued the first formally designated "executive order." But later that year, he ordered federal officials not to return captured former slaves to the states in rebellion in his "Emancipation Proclamation." <sup>36</sup> In sum, there is not much that distinguishes Lincoln's executive orders from his wartime proclamations-apart from the title. Likewise, President Andrew Johnson could have issued an executive order (instead of a proclamation) on Christmas Day 1868 that all public officials recognize and give effect to his decision to pardon all persons recently in rebellion. Modern practice has delineated the borders of these devices somewhat more, but there is little to constrain a President from departing from the modern practice.

The presidential "signing statement" demonstrates that hybrid directives are even harder to

categorize. Presidents often issue such written statements when they sign a bill into law. Presidential signing statements are themselves a type of directive, but they can incorporate language similar to that in an executive order or a presidential proclamation. For example, some signing statements identify a provision of the bill that the President believes is unconstitutional and instructs executive branch officials not to enforce the provision. <sup>37</sup> Assuming the President has this power—and the author believes he does <sup>38</sup>—the wording of his signing statement should not matter. A signing statement ordering all executive branch officials not to enforce a particular provision in the statute because it is unconstitutional would have the same effect as a signing statement in the form of a proclamation to all concerned that the President believes a particular provision to be null and void. A faithful servant in the executive branch ought to give both statements the same effect. An official outside the executive branch ought to give both statements the same deference, regardless of what level of deference that is.

Many Forms of Directives. One scholar has identified 24 different types of presidential directives, <sup>39</sup> although even his list is incomplete. A partial list includes administrative orders; certificates; designations of officials; executive orders; general

- See, e.g., E.O. No. 13120 (1999) (ordering reserve units into active duty in NATO's campaign in Yugoslavia). See also E.O. No. 13088 (1998) (prohibiting trade with Yugoslavia, Serbia, and Montenegro) and E.O. No. 13119 (1999) (designating Yugoslavia and Albania as war zones).
- 36. The Emancipation Proclamation ordered the "Executive Government of the United States, including the military and naval authorities thereof, [to] recognize and maintain the freedom of those set free by the Proclamation. See the Emancipation Proclamation, September 22, 1862 (original Proclamation), and January 1, 1863 (final Proclamation).
- 37. Presidents since John Tyler have claimed this power and increasingly have exercised it during the past 50 years. See Douglas W. Kmiec, OLCs Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 Cardozo L. Rev. 337, 347–359 (1993)
- 38. Although there is controversy surrounding this practice, it should be defended in appropriate circumstances. The President has an obligation not to enforce a particular provision of a law that is unconstitutional, although the President can sometimes interpret the statute to avoid the constitutional infirmity. See Kmitec, OLCs Opinion Writing Function, at 347—359. See generally Who Speaks for the Constitution? The Debate Over Interpretive Authority, Federalist Society Occasional Paper No. 3 (1992) (on file with The Heritage Foundation and available from The Federalist Society). The President has a duty to try to defend the constitutionality of congressional acts if that is reasonably possible, but his ultimate oath is to defend the Constitution. When no reasonable defense of a provision is possible, the President is obliged to disregard the unconstitutional provision without waiting for a court to confirm his view. When only one provision or section of a statute is in question and it is "severable" from the rest, the Presidents position is analogous to that of a court which must treat an unconstitutional provision as null and void but may sign and enforce (or uphold, in the case of a court) the remainder of the statute. See Kmitec, OLCs Opinion Writing Function, at 347—352.

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licenses; interpretations; letters on tariffs and international trade; military orders; various types of national security instruments (such as national security action memoranda, national security decision directives, national security directives, national security treviews, national security study memoranda, presidential review directives, and presidential decision directives); presidential amnouncements; presidential findings; presidential reorganization plans; presidential signing statements; and proclamations.

Despite the specialized settings in which some of these directives are used, it is a bit misleading to overclassify presidential directives as comprising separate and distinct "types" just because they have different headings at the top of the first page. The distinctions between some of these directives are merely convenient or the result of an arbitrary bureaucratic evolution. As the list of directives also demonstrates, a new President and a creative bureaucracy could come up with 24 new "types" if they wished to do so.

There are, however, some practical constraints that limit, or at least influence, a President's decision on which form of directive to use. As mentioned earlier, tradition and historical practice will often lead to a particular choice. For example, a President will probably want to use a published executive order to repeal or modify a previously published executive order. Political considerations may also weigh in favor of a more or less public directive. But unless a statute requires a President to use one form of directive in the exercise of his statutory (as opposed to constitutional) authority, the President can revoke or modify a previous directive or issue a new one orally or in any written form he chooses. To a military officer in the

field of battle, telephone calls, cables, or handwritten notes from the President are, and should be, equally compelling orders. 40

Despite the variety of directives used, there are sound reasons why scholars focus most of their attention on executive orders and presidential proclamations. Executive orders and presidential proclamations are the forms most frequently used by Presidents to convey important decisions that affect the general public. Because better records have been kept of executive orders and proclamations, it is also possible to compare the relative use of them by different Presidents. In addition, most other presidential directives can be analogized to a typical executive order or presidential proclamation, so the discussion of them can be applied elsewhere.

Procedures for Issuing Proclamations and Executive Orders. The federal law governing presidential decrees is sparse. Since 1935, a federal statute provides that presidential proclamations and executive orders "of general applicability and legal effect" must be published in the Federal Register unless the President determines otherwise for national security or other specified reasons. 41 In addition, some federal statutes that delegate statutory authority to the President require him to exercise that authority through the issuance of a particular type of directive, generally a published proclamation or an executive order. Other than these few rules, a President is free to adopt procedures regarding the issuance and publication of directives as he sees fit.

For over 100 years, the President has asked the Attorney General or another senior official in the Department of Justice to review draft executive

<sup>39.</sup> See generally Relyea, Presidential Directives.

<sup>40.</sup> We can imagine a hypothetical military command to disregard any subsequent order unless it is delivered in a particular way or accompanied with a secret code. But in such cases, the President himself has attempted to limit his future options to ensure the authenticity of future orders. That does not undermine the normal validity of any particular type of order. As an aside, it is also far from clear in the hypothetical above whether a subsequent order that appears to be authentic but violates the protocol should always be disregarded. For examples of how Hollywood has portrayed this dilemma (which is a lot more fun than a legal discussion), compare Fail Safe (in which the refusal to follow the President's nonconforming oral command to abort a bombing run leads to the nuclear annihilation of Moscow and New York City) with Crimson Tide (in which Denzel Washington's arguably mutinous act to disregard the firing protocol saves the world from nuclear holocaust).

<sup>41.</sup> That statute is now codified at 44 U.S.C. § 1505.

orders and proclamations with regard to their form and legality. Since 1962, the proper form and routing of executive orders and proclamations has been governed by Executive Order 11030, which makes the Director of the Office of Management and Budget responsible for shepherding such directives through the process.

The Attorney General's review responsibility is currently delegated to the head of the Office of Legal Counsel (OLC) in the Department of Justice. OLC staff attorneys work with lawyers in the Office of Management and Budget, the Office of White House Counsel, and the originating agency (if there is one) to ensure that the draft order or proclamation is legal and in the proper form. Once the order or proclamation is revised to his satisfaction, the Assistant Attorney General for OLC transmits it with a formal letter that dates back to the 19th century. The letter begins with the salutation "My dear Mr. President." It summarizes the proclamation or order in a few paragraphs and then assures the President that the document for his signature has been approved with regard to form and legality.

Some directives, including many military and national security orders, remain secret unless and until they are declassified. Others may not be secret, but they are not published either. Many presidential designations of officials, such as a White House special assistant to the President, are so routine that they do not merit publication. Of increasing use and importance are "presidential memoranda to the heads of executive departments and agencies." These memoranda also are rarely published, but some of them are more important than many executive orders that are published.

It is worth keeping in mind that a President may use one of the less public types of directives in almost any circumstance in which he could issue a published executive order or presidential proclamation. In some instances, President Clinton may have selected a memorandum format for political reasons precisely because he did not want to draw heightened attention to his act. President Clinton's initial instruction to allow open homosexuals in the military <sup>42</sup> and his order to allow abortions to be performed on military bases overseas <sup>43</sup> were issued by memorandum. Thus, it is unwise to arbitrarily exclude nontraditional directives, such as memoranda, when examining a President's rule by executive decree. That said, a review of published directives will include most of the important directives that affect the public.

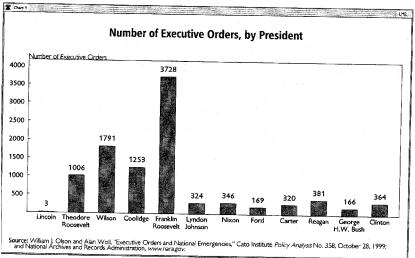
# Presidential Proclamations and Executive Orders by the Numbers

More than 7,300 presidential proclamations have been issued since 1789. Although they were not numbered sequentially until early in the 20th century, the earlier proclamations have been numbered retroactively, and newer ones are assigned a number upon issuance. As is discussed elsewhere, the overwhelming number of modern proclamations are ceremonial or hortatory, such as the commemoration of Thanksgiving or recognition of some particular interest. The two exceptions in modern practice do not make up a significant number of the total: declarations of emergency and land regulations under the Antiquities Act of 1906. Both are discussed further in this memorandum.

President Abraham Lincoln is credited with issuing the first directive called an "executive order" in 1862. Approximately 13,200 executive orders have been issued since then. <sup>44</sup> Chart 1 shows that the number of executive orders issued by recent Presidents has not matched that of Presidents in the early and mid-20th century. This is true even if the figures are adjusted to reflect the

<sup>42.</sup> On January 29, 1993, President Clinton ordered certain immediate changes in the military policy toward homosexual service members and directed the Secretary of Defense to prepare a draft executive order on the subject. See White House Press Documents on file with The Heritage Foundation. After a firestorm of protest, the Administration compromised on its position and had the Secretary of Defense issue a July 19, 1993, memorandum to the Service Secretaries and the Chairman of the Joint Chiefs of Staff instituting the "don't ask, don't tell" policy.

See Robin Toner, "Settling In: Easing Abortion Policy; Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush," The New York Times, January 23, 1993, p. 1.



length of service in office. President Franklin Roosevelt, who served for over three terms, still issued more executive orders per year than did any other President.

However, there is reason to be cautious in comparing the executive order output of Presidents from different eras, even in the same century. President Franklin Roosevelt was Commander in Chief during most of World War II. A wartime period will likely reflect many mobilization orders that are not applicable in other periods. In addition, he President's National Security Council was not

created until 1947, and many of the specialized directives that it now drafts were not developed until recent Administrations. <sup>45</sup> Thus, many of the executive orders issued by FDR might take some other form in a modern Administration. Many of these same considerations apply to other Presidents in the early and mid-20th century.

Although presidential executive order practices continue to evolve with each Administration, it is reasonable to make at least rough comparisons of the Presidents since 1960. Chart 2 shows that on an annualized basis, President Carter outpaced

<sup>14.</sup> Proclamations and executive orders were not numerically designated before 1907. In that year, a numbering convention was adopted. Existing proclamations and executive orders on file were numbered retroactively. In a few cases, executive orders discovered later were designated in the appropriate sequence with an extra letter or number, such as 1A or 28–1. Subsequent proclamations and executive orders have been numbered sequentially upon issuance.

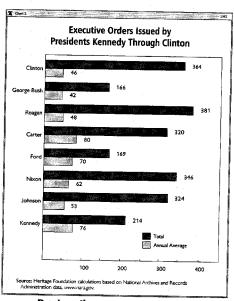
<sup>15.</sup> Since the formation of the National Security Council (NSC), American Presidents frequently have issued directives through the NSC to direct their foreign policy agenda. Although these directives are not counted as executive orders, their effect can be the same. Different Administrations have given such directives different names: NSC policy papers (Truman and Eisenhower). National Security Action Memoranda (Kennedy and Johnson), National Security Decision Memoranda (Nixon), Presidential Directives (Carter), National Security Decision Directives (Reagan), National Security Directives (George H. W. Bush), and Presidential Decision Directives (Clinton). No matter what their name, these presidential directives are usually classified, and Congress is rarely notified of their existence, although there is some precedent for providing copies or briefings when specifically requested.

other recent Presidents in the sheer number of executive orders issued. On an annualized basis, President Clinton did not issue a significantly different number of executive orders than did Presidents Reagan or Bush.

But as the next section shows, the overwhelming majority of directives, including executive orders, are routine and few have significant policy implications beyond the executive branch. Thus, it would be a mistake to conclude that the number of executive orders or proclamations is a reliable indicator of whether a particular President has abused his executive order authority. In fact, a more careful review of executive orders suggests no correlation between the overall number of executive orders issued and the legitimacy of individual orders. The true measure of abuse of authority is not the overall number of directives, but whether any orders were illegal or abusive, and if so, how many and of what signifi-

# A SURVEY OF CLINTON PROCLAMATIONS AND EXECUTIVE ORDERS<sup>46</sup>

The vast majority of modern presidential directives are routine or have little direct effect on the lives of citizens outside government. This holds true even for executive orders and presidential proclamations, which tend on average to have a greater impact on the public than do other directives. A review of President Clinton's proclamations and executive orders (881 and 364, respectively)<sup>47</sup> reveals some similarities and some important differences between Clinton's practices and those of his two predecessors.



#### **Proclamations**

President Clinton used his proclamation authority in many of the same ways as had previous Presidents. Many of his proclamations are hortatory and thus noncontroversial. For example, President Clinton issued an annual Thanksgiving Proclamation and proclaimed that certain days, weeks, and months would commemorate or recognize some cause (e.g., American Heart Month).

President Clinton's most significant departure from President Reagan and President George H. W. Bush was his use (and abuse) of his powers under the Antiquities Act of 1906 to designate millions of acres of federal land as protected national monu-

<sup>46.</sup> The review of President Clinton's proclamations and executive orders and the text in this section of the Memorandum were a collaborative effort by several scholars at The Heritage Foundation, including substantial contributions by Angela Antonelli, Dan Fisk, Mark Wilson, and Christopher Summers.

Heritage calculations derived from National Archives and Records Administration data, at http://www.nara.gov (February 7, 2001).



ments. The most controversial was Proclamation 6920, which established the 1.7 million-acre Grand Staircase–Escalante National Monument in Utah, but other designations are equally outrageous. (See Table 2.) Since the law was passed, Presidents have established over 100 monuments, covering 70 million acres.

President Clinton's proclamations have been highly controversial particularly with respect to the monuments' size, the process used to establish them, and restrictions on the use of the land. The Antiquities Act requires that monuments be "the smallest area compatible with the proper care and management of the objects to be protected." With only a few exceptions, including the 10,950,000-acre Wrangell–St. Elias National Monument created by President Carter in 1978, most monuments are relatively small (less than 5,000 acres). All of President Clinton's proclamations, however, cover very large areas of land.

President Clinton also proclaimed the Grand Staircase–Escalante Monument with insufficient public participation and arguably without adequate due process. Although the Antiquities Act may appear to grant this authority at first blush, inconsistencies between the Act and other laws that establish various notice and hearings processes raise important questions about the appropriate processes for designating monuments. Degitimate questions also exist about the applicability of the environmental review and due process requirements of the National Environmental Policy Act (NEPA). Degitimate questions also exist about the applicability of the environmental review and due process requirements of the National Environmental Policy Act (NEPA).

While presidential proclamations creating national monuments do not usually result in the outright taking of private lands (they only change the form of control over lands already owned by the federal government), they can restrict activities on the land, such as mining, grazing, or timber

harvesting, that is deemed to conflict with the intended purpose of the monument. The monuments created by President Clinton were intended to restrict significantly the use of natural resources. They prevent almost all future uses of the land and may work as a partial taking of mining, grazing, and timber leases owned by private individuals. This is one of the main reasons President Clinton was urged to grant monument status to certain parts of the Arctic National Wildlife Refuge just before he left office.

Several organizations have mounted legal challenges against President Clinton's proclamations. For example, the Utah Association of Counties, Utah Schools and Institutional Trust Lands Administration, and Mountain States Legal Foundation filed challenges against the designation of the Grand Staircase-Escalante National Monument.51 They have raised questions about violations of the Antiquities Act; the relative authority of the Congress, President, and Secretary of the Interior to withdraw lands from public use; the application of mining and mineral leasing laws; procedural and substantive issues under NEPA and the Federal Land Policy and Management Act (FLPMA); the lawful size of the monuments; and the nature of the resources being protected.

Of particular importance is whether President Bush or any future President has the authority to reverse a proclamation establishing a national monument. Though he may be able to modify or narrow the boundaries of an existing national monument, the authority to rescind a proclamation is less clear. Past Presidents have modified national monuments, but none has reversed the designation of an existing monument. A recent Congressional Research Service report, "Authority of a President to Modify or Eliminate a National Monument," discusses this issue. <sup>52</sup> Although the matter is not entirely free from doubt, I believe a

<sup>48. 16</sup> U.S.C. § 431

<sup>49.</sup> See, e.g., the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. (FLPMA).

<sup>50. 42</sup> U.S.C. § 4321 et seq. (NEPA).

<sup>51.</sup> For a more detailed discussion of these cases, see Carol Hardy Vincent and Pamela Baldwin, "National Monuments and the Antiquities Act," Congressional Research Service, CRS Report for Congress No. RL30528, April 17, 2000, at http:// www.cnic.org/nle/pub-15.html.



President can at least rescind any prior designation under the Antiquities Act that was improper.

In addition, various legislative proposals for addressing the issues raised by President Clinton's proclamations were introduced in the last Congress. 53 They focused principally on modifying the Antiquities Act and sought to ensure greater public consultation, environmental review, congressional approval, and other procedural protections.

With regard to his power under the Antiquities Act, President Bush should:

- Review existing presidential authority to
  - reverse designations of federal lands as national monuments;
- Examine existing designations to determine whether modifications in the boundaries or the allowed uses are appropriate;
- Seek (if necessary) congressional action to clarify presidential, congressional, and other executive branch authority to reverse or modify previously designated monuments; and

Table 2 Monuments Designated by President Clinton by Proclamation Proclamation Monument 6920 September 18, 1996 Grand Staircase-Escalante 1,700,000 7263 january 11, 2000 Agua Fria 71,100 7264 January 11, 2000 California Coastal 840 miles 7265 January 11, 2000 Grand Canyon-Parashant 1,014,000 7266 January 11, 2000 Enlargement of the Pinnacles 7,900 7295 April 15, 2000 Giant Sequoia 327,769 7317 June 9, 2000 Canyons of the Ancients 164,000 7318 June 9, 2000 Cascade Siskiyou 52,000 7319 June 9, 2000 Hanford Reach 195,000 7320 June 9, 2000 Ironwood Forest 128,917 7373 November 9, 2000 Enlargement of Craters of the Moon 661,287 7374 November 9, 2000 Vermilion Cliffs 293,000 7392 January 17, 2001 Boundary Enlargement and Modifications of the Buck Island Reef 18,135\*\* 7393 January 17, 2001 Carrizo Plain 204.107 7394 January 17, 2001 January 17, 2001 Kasha-Katuwe Tent Rocks 4,148 7395 Minidoka Internment 72.75 7396 January 17, 2001 Pompeys Pillar 51 7397 January 17, 2001 Sonoran Desert 486.149 7398 January 17, 2001 Upper Missouri River Breaks 377.346 7399 January 17, 2001 Virgin Islands Coral Reef 12,708\*\* 7402 January 20, 2001 Governors Island 20 Total Acres 5,686,767\*\*

Note: \*Excludes California Coastal because total acreage cannot be readily calculated. \*\*Figure is denoted in marine acres. \*\*\*Total exkudes California Coastal acreage and marine acres. Source: National Archives and Records Administration, www.nara.gov.

 Seek congressional action to increase the public consultation, environmental review, and other procedures applicable to the creation of new monuments.

# **ADMINISTRATIVE ORDERS**

Over half of President Clinton's executive orders (approximately 181) were routine administrative orders that can be broken down into the following groups or purposes:

- Organize/Reorganize the Executive Branch
- 52. See Pamela Baldwin, "Authority of a President to Modify or Eliminate a National Monument," Congressional Research Service, CRS Report for Congress No. RS20647, August 3, 2000.
- 53. 106th Congress, specifically H.R. 1487 and S. 729.



- 1. Establish Orders of Succession within Executive Agencies.
- 2. Designate Officials in the White House and Executive Agencies.
- Delegate Authority within the Executive Branch.
- 4. Create or Terminate Advisory Boards, Commissions, and Councils.
- Federal Personnel Decisions
  - 1. Establish Cost of Living Increases for the Civil Service.
  - Recognize Government Holidays and Government Closures.

President Clinton issued dozens of executive orders to establish or terminate a particular federal advisory board, commission, or council (collectively referred to here as "commissions"). All recent Presidents have created similar commissions. Many of these commissions expire with the passage of time or by the completion of a final report, and President Bush is free to use or eliminate the rest. Indeed, each new President should review the list of such commissions to see how many still exist and what purpose they serve. Yet the creation, elimination, or consolidation of such commissions is unlikely to have a major policy impact on a new Administration.

Succession orders specify the hierarchy of authority within an agency and should be revised when Congress has modified or created new offices at the same level within the agency, such as the Assistant Secretary level. The typical order of succession lists the hierarchy by office rather than by office holder. In the Department of Justice, for example, the order of succession after the Attorney General is the Deputy Attorney General, the Associate Attorney General, the Solicitor General, then the Assistant Attorney General for the Office of Legal Counsel, and so forth. During Watergate, it

was necessary for Solicitor General Robert Bork to become Acting Attorney General when the top two appointees stepped down during the so-called Saturday Night Massacre. The order of succession is invoked far more often for temporary assignments of responsibility when senior officials are on vacation or otherwise are unavailable due to vacancy in office, travel, illness, etc. President Bush is free to modify these succession orders but need not do so unless Congress modifies the principal offices within a particular agency. Once again, this is not a priority area.

Many designations of officials, such as those in the White House, and some delegations of authority will expire with the normal change in personnel at the beginning of a new Administration. The remaining designations of officials and delegations of authority will eventually come to the attention of officials in the Office of Presidential Personnel or the new Cabinet Secretaries. President Bush should review previous designations and delegations, but this should be done in an orderly fashion. In addition to those with responsibility for such matters within the White House, the President and his assistants should call upon the Justice Department's Office of Legal Counsel for legal advice on keeping agencies running smoothly during the first few months of the new Administra-

Many of President Clinton's personnel executive orders were also routine. These include executive orders that establish pay scales, annual salary increases, and conditions for civil service or appointed positions.

# SUBSTANTIVE ORDERS

Most of the remaining executive orders issued by President Clinton can be divided into five substantive categories: foreign and defense policy, environmental policy and natural resources, regulatory review, labor policy, and civil rights issues. These executive orders show the greatest break

<sup>54.</sup> Although the appointment of the Assistant Attorney General for OLC should be one of the Administration's top priorities, the senior career attorneys who have been through a number of transitions prior to the Clinton Administration can be counted on to provide professional advice on a number of arcane legal doctrines relating to temporary delegations and acting appointments.



from past Administrations and include most of the controversial orders. Two other categories, government procurement and "emergency" orders, frequently overlap with and frequently include these five substantive categories. 55

President Clinton repealed a number of important executive orders issued by Presidents Reagan and Bush, who both had issued a variety of crosscutting executive orders calling on executive branch agencies to take important constitutional or institutional principles into account when they take regulatory action. The constitutional and institutional principles elevated by Presidents Reagan and George H. W. Bush were varied but fundamental. They included paying special attention to the cost and benefit tradeoffs of government regulation (Executive Order 12291, 1981); the constitutional structure of federalism with an instruction not to carelessly preempt state authority and law (Executive Order 12612, 1987); avoiding interference with the traditional family (Executive Order 12606, 1987); the constitutional guarantee against uncompensated takings of private property (Executive Order 12630, 1988); and the clarity of drafting regulations and whether any unclear rules would lead to costly and unnecessary law suits (Executive Order 12778, 1991).

President Clinton repealed all of these crosscutting executive orders. In some cases, he replaced them with weaker executive orders that purported to address the same goals. For example, his regulatory review executive order (Executive Order 12866, 1993) weakened the cost-benefit analysis that agencies are required to prepare for review by the Office of Management and Budget. President Clinton signed his initial federalism executive order (Executive Order 13083, 1998) in Birmingham, England, but it created such an outcry that he eventually suspended it and replaced it (Executive Order 13132, 1999).

The overarching themes of President Clinton's executive orders were:

- A relative shift in foreign policy and national security from concerns about national interests to international arrangements;
- The promotion of federal government control over environmental policy, with a corresponding disrespect for the rights of private property owners;
- The expansion of federal regulatory power over various aspects of private life;
- The promotion of organized unions' political agenda at the expense of government and consumer efficiency; and
- The promotion of preferential treatment and quotas for certain racial and ethnic groups at the expense of equal treatment under law.

Foreign and Defense Policy. More than half of Clinton's substantive orders were in the area of foreign affairs or national defense policy. Presidential directives in the foreign and national security arena should focus on aligning American policy with the President's priorities to ensure the effective defense of the United States and its allies. To this end, one of the Bush Administration's first priorities should be to issue new directives that provide for the protection of American territory from the increasing threat of ballistic missile attack. An equally important priority is mandating a comprehensive review of the Clinton Administration's Presidential Decision Directives, with specific attention focused on areas that affect the strategic posture and peacekeeping commitments.

Environmental Policy. During his tenure, President Clinton issued approximately 40 executive orders related to the environment and natural resources, and made extensive use of executive orders to achieve his environmental policy and political objectives. Prior Presidents used executive orders, proclamations, or other administrative means to further environmental goals (the most notable recent example being President Nixon's creation of the Environmental Protection Agency),

<sup>55.</sup> For example, President Clinton attempted to use the government's procurement power to advance certain labor, environmental, and civil rights objectives, and invoked various emergency powers to achieve military and foreign policy goals as well as some domestic policy ends.



but few reached the level achieved during the Clinton Administration.

Although most of President Clinton's orders were drafted to appear as if they focus primarily on operations of the federal government, their clear intent was to affect the private marketplace, public behavior, and government policy at the state, local, and international levels. They ranged from actions that address comparatively straightforward matters of agency management to establishing environmental civil rights, linking environmental and trade policy, and using proclamations to establish national monuments or other protected areas.

Each executive order should be carefully reviewed to determine whether the current Administration should (1) allow it to continue; (2) revoke it or replace it with a new directive; (3) revise, supplement, or otherwise amend it; or (4) redirect agency implementation through a presidential memorandum or other action. Initially, the Bush Administration should reorient federal agency implementation of the existing orders. Certain orders, for example, have established interagency committees, comprised of Cabinet-level officers, that could be used to begin redirecting agency activity.

Regulatory Review. In 1993, President Clinton revoked several major executive orders, including Executive Order 12291, which had governed important oversight aspects of federal regulatory and policymaking processes since 1981. He replaced them with two orders that maintain many of the same underlying principles but contain important procedural and substantive flaws. Clinton's Executive Order 12866 on "Regulatory Planning and Review" currently governs the process for developing federal regulations. The Bush Administration may wish to replace the Clinton order with a stronger management tool that builds on Executive Order 12291 and incorporates other procedures to strengthen the President's ability to exercise authority over the rulemaking process. In

the meantime, the requirements of E.O. 12866 (or any similar order) should be scrupulously enforced as part of an effort to see that the President can exercise his constitutional authority effectively.

Clinton's second Executive Order 13132 on "Federalism" (which replaced his failed Executive Order 13083) attempts to clarify the relative roles of the states and the federal government in a variety of regulatory and policy actions. Although President Reagan's federalism Executive Order 12612 (which President Clinton repealed) is still superior to either of Clinton's statements on federalism, action by Congress, the states, and the Supreme Court in the intervening years suggests there may be grounds to revisit the issue anew. With proper input from state and local officials, President Bush is in a good position to begin the process of ensuring that the national government does not unconstitutionally encroach on powers reserved to the states or interfere with individual rights of citizens.

Labor Policy. The Clinton Administration used labor-related executive orders and directives primarily to advance the political objectives and interests of its supporters in organized labor. <sup>56</sup> It also used these orders to create task forces to study a variety of workplace issues, to improve employment opportunities for disabled Americans, and to expand the number of groups covered by employment nondiscrimination executive orders.

The highest priority labor-related executive orders for the Bush Administration to review include (1) the financial reports that unions are required to furnish under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) so that workers can more easily exercise their decision rights under *Communications Workers* v. *Beck*, <sup>57</sup> (2) the Birth and Adoption Unemployment Compensation regulation, which undermines the original intent of the Unemployment Insurance program, <sup>58</sup> and (3) all executive branch policies

One of the first executive orders (E.O. No. 12836) issued by President Clinton dealt with union-only federal contracts and union dues.

<sup>57. 29</sup> U.S.C. Chapter 11. The Bedit decision recognized that union employees may not constitutionally be required to pay the portion of their dues that is used for political activity.



requiring federal contractors to enter into agreements with unions on construction projects.

Civil Rights. Approximately 18 executive orders contain a significant civil rights component. Of these, several are plainly unconstitutional because they attempt to impose preferential governmental treatment on the basis of race and ethnicity with no remedial justification. These unconstitutional orders should be revoked as soon as practicable and replaced with orders that ensure equal treatment and equal opportunity for all Americans. Another order should be issued to implement the Supreme Court's landmark decision in Adarand Constructors, Inc. v. Peña (1995), which held that all federal preserence programs are presumptively unconstitutional. Despite the Clinton Administration's efforts to resist these and other court rulings, the Bush Administration should undertake a careful review of all federal preference programs, whether created by statute or regulation, and take action consistent with the Adarand ruling.

# THE EFFECT OF PRESIDENTIAL DIRECTIVES ON PRIVATE CITIZENS

As the preceding section explains, many administrative directives either have no direct effect or have a trivial effect on the rights exercised by the general public. For example, a particular reporting structure or order of succession within the executive branch has no direct effect on the rights of private citizens even if it sometimes results in a different decision's being made. <sup>59</sup> Other directives may affect the general public but may be difficult or impossible to challenge, depending on a variety of factors. <sup>60</sup>

#### Political Questions and Matters Squarely Committed to Presidential Discretion

Presidential decisions that present "political questions," as that term has been defined in the law, or actions that are squarely committed to the President's discretion do not present justiciable issues for a court to resolve. There are some unresolved questions regarding a President's commitment of troops in an undeclared war, but they often present political questions that only Congress and the President can resolve. Whether the overall military action is authorized or not, however, a President's tactical military commands are committed to his sole discretion. Such tactical military commands simply are not subject to challenge, regardless of their effect on numerous people's lives.

A presidential pardon is another example of a decision squarely within the President's discretion.61 President Thomas Jefferson believed that the Sedition Act of 1798 was unconstitutional, although the courts had upheld over 10 convictions under it. President Jefferson could not overturn the convictions, but he did drop the remaining prosecutions when he assumed office and pardoned the two individuals still in prison. Jefferson's pardons were not subject to challenge. Likewise, President Clinton's pardons of 16 Puerto Rican terrorists (FALN pardons) on August 11. 1999, and his many questionable pardons on January 20, 2001, are not subject to challenge in court-regardless of Clinton's alleged political or other improper motives in granting the pardons. The fact that the Sedition Act truly was unconstitutional<sup>62</sup> and Clinton's pardons were arguably

- 58. Federal Register, Vol. 64, No. 232 (December 3, 1999), p. 67971.
- 59. The executive branch "deliberative process" is also constitutionally protected for reasons founded in the President's executive authority and the separation of powers. See *United States v. Nixon*, 418 U.S. 683, 705–713 (1974) (recognizing constitutional protections for the executive branch deliberative process); *In re: Sealed Case*, 121 E3d 729, 743 (D.C. Cir. 1997).
- For a good discussion of this topic, see Bryan A. Liang, "'A Zone of Twilight': Executive Orders in the Modern Policy State," National Legal Center for the Public Interest, Washington, D.C., March 1999.
- 61. U.S. Const., Art. II, § 2, cl. 1; United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("[t]o the executive alone is entrusted the power of pardon").
- 62. President Jefferson issued his pardons in separate "clemency warrants" for David Brown and Thomas Callender. Brown had been convicted and sentenced by Justice Samuel Chase for publishing "false, scandalous, malicious, and seditious writings" against the United States. Callender was a famous pamphleteer convicted of "malicious writings."



corrupt still does not make one more or less subject to challenge. The congressional probe into President Clinton's FALN pardons was questionable unless Congress was willing to consider impeachment proceedings for an improper motive. <sup>63</sup> Even then, nothing can change the effect of a duly issued pardon. <sup>64</sup>

Delegations of presidential authority, in themselves, rarely alter public rights. Regardless of their effect on the public, most delegations of authority are squarely within the President's discretion and are thus immune from challenge. The Constitution provides for both principal and inferior officers to assist the President, and the President's authority to delegate portions of his executive power within the executive branch has been broadly construed. For example, Executive Orders 2877 (1918) and 12146 (1979) delegate to the Attorney General the responsibility to resolve legal disputes within the executive branch. Because the President possesses the power to interpret the law within the executive branch,65 he may entrust some of that power to the Attorney General and order other federal officers and employees to abide by the Attorney General's opinion.66

# Directives with Indirect Effects on the Public

Some directives may not be subject to judicial review if the effect on private citizens is indirect or if the directive is implemented through agency regulations or other agency action. Both President Reagan's and President Clinton's regulatory review executive orders (Executive Orders 12291 and 12866, respectively) are examples of orders with indirect effects on private citizens. The orders required regulatory agencies to prepare certain analyses of proposed rules and to take various factors into account in their regulatory decisions, and they allowed the Office of Management and Budget to oversee the rulemaking process. However, neither order altered the statutory obligations of the regulatory agencies to issue particular substantive rules. A citizen adversely affected by a regulation (or lack thereof) has the same judicial recourse regardless of the type of executive branch review the rule underwent. Thus, the citizen may challenge the resulting substantive rule but may not challenge the type of executive branch review it received.

The lack of judicial review to challenge a regulatory review executive order does not mean that such orders have no impact on the regulations issued. Presidents Reagan and Clinton would not

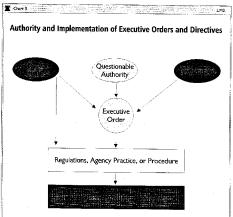
- 63. The House report on the FALN pardons does raise some troubling issues regarding the President's use of his pardon power. The report also contains letters from the Attorney General and the White House asserting their immunity from congressional oversight. See H. Rep. No. 488, 106th Cong., 1st Sess. (1999). See also Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) ("Congress cannot interfere in any way with the President's power to pardon.").
- 64. That said, if a President or his advisers accepted a bribe in exchange for granting a pardon, that would be a separate crime. The person offering a bribe would be equally subject to prosecution, unless the subsequent pardon discharged that liability as well. Nevertheless, it is still unclear what role Congress should take in unvestigating the Marc Rich or similar pardons by the former President. Impeachment is no longer an option, and Congress cannot dictate pardon review procedures to a future President. Finally, bribery allegations are usually best left to professional prosecutors and grand jury investigations.
- 65. Article II of the Constitution vests in the President "[t]he executive power," which includes the responsibility to "take care that the laws be faithfully executed." See Art. II, § 1, cl. 1, and Art. II, § 3. Moreover, the doctrine of "coordinate branch construction" holds that the President not only may interpret the law in situations where the courts have not issued an opinion binding on the government, but also is required to render independent judgment in many such cases. His duty is derived from the clauses cited above and aspects of the constitutional separation of powers. This conclusion is also reinforced by the debate at the Constitutional Convention, at which a council of revision was rejected. See generally Symposium on Executive Branch Interpretation of Law, 15 Cardozo L. Rev. 21–523 (1993).
- 66. See also 28 U.S.C. §§ 511–513, 521. The Attorney General subsequently delegated her statutory and executive order authority to issue binding legal opinions to the Department of Justice, Office of Legal Counsel. 28 U.S.C. § 510; 28 CFR § 0.25.

have altered the type of review if they did not think it mattered. But it would be highly speculative to predict ex ante (assuming it can be discerned at all) what effect OMB review will have on a particular rule in the future. More important, the type of executive branch review, in itself, does not alter the rights of the private citizens who are regulated to challenge the regulation directly in court.

Some executive orders explicitly instruct an agency head to issue particular regulations. In such situations, the regulations clearly result from the executive order. But it is usually easier for someone adversely affected by the regulation or other agency action to challenge the agency action itself rather than the presidential order. In litigation or other administrative challenges to the regulation, the fact that the President ordered that the regulation be issued is irrelevant unless the President possesses some constitutional or statutory power that augments the agency's authority. Whether the authority is cited or not, the underlying constitutional or statutory authority either exists to support the regulation or does not. (See Chart 3.) The fact that the agency was instructed by the President to issue the regulation can only help, but it may add nothing to the legal analysis of the regulation.

# **Standing Requirements**

Other directives may have a direct and predictable affect on the rights of parties outside the government, but the proper party must challenge the directive before a court may act. If the President attempts to place conditions on who may bid for or receive government contracts, that action may have a predictable effect on prospective government contractors. A current or prospective government contractor who is adversely affected by the new conditions may seek to have them invalidated, but only such contractors and other injured parties within a foreseeable "zone of interest" may



do so. The average citizen who is seeking to ensure good government does not have a "particularized injury" to redress, and his challenge will likely be thrown out of court. Thus, even an unlawful executive order that directly affects the public will survive a challenge if no one with proper standing to sue brings the case.

President Clinton's American Heritage Rivers Initiative (AHRI), established by Executive Order 13061, is an example of a presidential directive that appears to be illegal but has not yet been judicially invalidated because of a "technical" standing problem. The scope of the initiative is somewhat unclear, and a thorough discussion of it is not possible here, but the program grants power to "river navigators" to supervise and control development along designated rivers for a variety of purposes, including environmental, social, educational, and economic concerns. A river navigator's control purports to extend over the entire watershed of the river. 67

In 1998, Representatives Helen Chenoweth (R–ID), Bob Schaffer (R–CO), Don Young (R–AK),

67. H. Rep. 105-781, 105th Cong., 1st Sess. (1997), p. 21.



and Richard Pombo (R–CA) sought an injunction in federal district court against implementation of the AHRI. These Members of Congress alleged that the AHRI violated various laws, including several appropriations laws and other acts under the oversight of committees or subcommittees they chaired. They attempted to invoke a "congressional standing" doctrine, alleging an injury to their right to vote as Members of Congress. Both the district court and the U.S. Court of Appeals for the District of Columbia dismissed the suit without reaching the merits. The judges rejected the argument that plaintiffs suffered an injury unique to Members of Congress and concluded instead that any injuries from AHRI were "wholly abstract and widely dispersed." 68

#### **REFORM PROPOSALS**

During the 106th Congress, several measures were introduced to address Congress's concern over President Clinton's broad assertion of power to govern by decree. At least two measures were the subject of hearings held by the House Judiciary and Rules Committees. House Concurrent Resolution 30 (HCR 30), introduced by Representative Jack Metcalf (R-WA) with 75 other cosponsors, would have expressed the sense of Congress that any executive order that "infringes on the powers and duties of Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the Executive order, is advisory only and has no force and effect unless enacted by law." HCR 30 itself would have been "advisory only." But statutory language modeled after the resolution would have serious constitutional and other problems because of its ambiguous reach and its potential to interfere with or "infringe" the President's shared or exclusive pow-

The Separation of Powers Restoration Act (H.R. 2655), introduced by Representative Ron Paul (R-TX) in 1999, has several provisions that are wor-

thy of further consideration and others that are problematic. H.R. 2655 would have terminated all existing national emergencies declared by Presidents under various statutes. The number of ongoing, declared emergencies is surprising. <sup>69</sup> There clearly is a need for Congress or the President to review and terminate those that do not still present exigent circumstances.

H.R. 2655 also would have taken away the Presidents power to declare any future national emergency. A convincing case can be made that the emergency powers Congress has granted the President in various statutes (most notably, the International Emergency Economic Powers Act, or IEEPA) are too broad. Yet narrowing the President's range of discretion by further defining an appropriate emergency or limiting the President's range of action for various emergencies might be wiser than simply eliminating all such power. Moreover, the President may have some inherent authority as Commander in Chief to take certain actions during a war or military crisis.

H.R. 2655 also would have attempted to define a presidential directive. It addition, it would have required that all presidential directives specify the constitutional and statutory basis for any action incorporated in the directive or be void as to parties outside the executive branch. With few exceptions, most recent Presidents before Clinton did cite the font of their authority in their executive directives. President Clinton cited some authority in a majority of his directives, but others were vague or had no citation of authority at all. A faithful executive should not have a problem citing the authority for his actions, and this requirement would help citizens, lawyers, and the courts evaluate new directives. Although there may be some constitutional problems with the application of this requirement in some cases, it is worth further consideration and possible refinement

Finally, H.R. 2655 would have attempted to expand the number of parties with standing to challenge an arguably unlawful directive, includ-

<sup>68.</sup> Chenoweth, et al. v. Clinton, 181 E3d 112 (D. C. Cir. 1999); see also Raines v. Byrd, 521 U.S. 811 (1997) (rejecting a similar congressional standing theory in the first challenge to the Line Item Veto Act of 1996).

<sup>69.</sup> See Olson and Woll, "Executive Orders and National Emergencies," at 19-20.



ing Members of Congress, state and local officials, and any aggrieved person. Because part of the standing doctrine is constitutional, a statute could not automatically confer standing on someone without a "particularized" injury in fact. Nevertheless, the provision would potentially expand the range and number of persons who could bring suit to challenge a questionable directive by removing any statutory impediments to suit.

The President is free to take up such internal reforms as he deems appropriate, including any that are designed to address past congressional concerns. Such institutional reforms tend to have a more lasting effect than many statutory reforms, perhaps in part because executive branch officials are directly answerable to the President and perhaps also because they are instituted with more flexibility or sensitivity to the needs of future Presidents. Whatever the reason, it makes sense for a new President to follow tradition but also to consider, in time, proposals to improve the process by which executive directives are issued.

#### CONCLUSION

A proper understanding of a President's power to issue executive orders, proclamations, and other directives will enable President Bush to use this power confidently in the exercise of his constitutional responsibilities and to implement important Administration policies. An aggressive use of this power is necessary for a modern President to project strength as leader of the free world and to manage the largest bureaucracy in the world.

The Bush Administration will have to weigh its legal options, political concerns, and policy objectives to find the right solution for each opportunity or problem. A substantive review of President Clinton's executive directives, however, suggests that President Bush has many opportunities to make a significant impact with a carefully orchestrated program of executive orders and presidential proclamations. Such a program may be even more important in light of the narrow margins in the 107th Congress.

—Todd E Gaziano is Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation.

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Mr. BARR. Thank you, Mr. Gaziano. Professor Mayer, you're recognized for 5 minutes.

STATEMENT OF KENNETH R. MAYER, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF WISCONSIN-MADISON Mr. Mayer. Thank you, Mr. Chairman.

I would just like to state for the record that my book, called "Dysfunctional Congress" had a question mark at the end and that

my answer was "no".

It's an honor to have an opportunity to speak to you about the issue of executive orders and presidential power. In my view, the previous administration's use of executive orders and proclamations was not exceptional. Although many of President Clinton's orders were controversial, and some were overturned by the courts and in response to congressional pressure, his administration was actually continuing a longstanding practice by Presidents, who have used executive orders to assert control over administration and policy.

Historically, Presidents have used executive orders to implement momentous policies. A short review confirms that this is the case. Nineteenth century examples include Jefferson's Louisiana Purchase, Andrew Jackson's 1832 Proclamation Regarding Nullification, and Lincoln's Emancipation Proclamation, all among the most

important actions ever taken by any President.

In 1939, President Franklin Roosevelt used an executive order to create the Executive Office of the President, the touchstone of mod-

ern presidential leadership.

Through executive orders, Presidents have almost singlehandedly created the Federal Government's classification system for national security information, as well as the personnel clearance system, which determines whether individuals will have access to that information.

With Executive Order 12291, issued in 1981, President Reagan reshaped the regulatory process by giving the Office of Management and Budget the right to review proposed regulations to ensure they were justified by cost-benefit analysis and consistent with the President's broader agenda. This order, which extended earlier and less successful efforts by Presidents Nixon, Ford and Carter to contain regulatory expansion, has been continued under President Clinton, though in somewhat modified form.

Since executive orders are a tool of the President's executive power, their reach extends as far as the executive power itself. Ultimately, there is no conclusive answer to the question of how far that power reaches because, after 200 years of precedent and judicial opinion, the scope of the executive power remains somewhat ambiguous. What this review demonstrates, though, is that signifi-

cant or controversial executive orders are nothing new.

It is important to place the existing controversy in historical perspective and to note that concerns about the scope of presidential

authority are often tied to opposition to particular policies.

The disputes over the previous administration's use of executive orders and proclamations to create national monuments and otherwise implement unilateral policies have developed along these same lines. Many of those who oppose the underlying policy raise questions about process and legality, while supporters argue that the acts are based on legitimate statutory or constitutional powers.

Critics of President Clinton's orders and proclamations have asserted that he went well beyond the proper scope of presidential power. In 1981, though, critics of Executive Order 12291 were making the same argument about President Reagan, and in 1793, crit-

ics of President Washington's neutrality proclamation made the same argument about him.

Executive orders are subject to important checks. An order not based on a legitimate grant of statutory or constitutional power has no force, and the judiciary has stepped in to reverse improper presidential actions, as occurred with Clinton's replacement worker executive order.

It is not a coincidence that many of the most significant Supreme Court rules on presidential power have involved executive orders, including Youngstown, Korematsu, Schechter versus United States, Cole versus Young, and Ex Parte Merriman. Judicial deference to presidential authority is substantial, but it is not unlimited.

Congressional action serves as another check. Particularly when the President is acting pursuant to a statutory delegation of power, Congress clearly has the authority to prevail. The legislature's recent action overturning OSHA's ergonomics regulation is but one case in point.

Congress would be well within its rights to modify the Antiquities Act to restrict the President's ability to create new national monuments, or to repeal the ban on assassinations included in the various intelligence executive orders, or to replace the executive orders and classification with a statutory framework.

The ultimate check on executive energy is, and should be, political. Congress could step in to reclaim the ground it has lost to the executive, and the fact that it has not done so is much more a function of context than any flaws in constitutional arrangements.

Thank you.

[The prepared statement of Mr. Mayer follows:]

Prepared Statement of Kenneth R. Mayer, Professor of Political Science, University of Wisconsin-Madison

Good morning Mr. Chairman and members of the committee. It is an honor to have the opportunity to speak to you about the issue of executive orders and presidential power.

In my view, the previous administration's use of executive orders and proclamations was not exceptional. Although many of President Clinton's orders were controversial, and some were overturned by either the Courts or through congressional pressure, his administration was actually continuing a longstanding practice among presidents, both Republican and Democratic, who have used executive orders to assert control over administration and policy.

sert control over administration and policy.

Historically, Presidents have used Executive orders to make momentous policy choices.

A short review confirms that executive orders and proclamations can have profound consequences. 19th Century examples include Jefferson's Louisiana Purchase, Andrew Jackson's 1832 Proclamation Regarding Nullification, and Lincoln's Emancipation Proclamation, all among the most important actions ever taken by any president.

In 1939 President Franklin Roosevelt used an Executive order to establish the Executive Office of the President, the touchstone of modern presidential leadership.

Presidents have resorted to executive orders to implement many of the nation's most dramatic civil rights policies. These include Truman's integration of the armed forces and Eisenhower calling the Arkansas National Guard into active military service in Little Rock, Arkansas, in order to enforce a court order to integrate Central High School.

Through executive orders, presidents have almost single-handedly created the federal government's classification system for national security information, as well as the personnel clearance process which determines whether individuals will have access to that information.

With Executive Order 12291, issued in 1981, President Reagan reshaped the regulatory process, granting the Office of Management and Budget the right to review

proposed regulations to insure that they were justified by cost benefit analysis and in line with the president's broader agenda. This order, which extended earlier and less successful efforts by presidents Nixon, Ford, and Carter to contain regulatory expansion, has been continued under President Clinton, though in somewhat modified form.

Since executive orders are a tool of the president's executive power, their reach extends as far as the executive power itself. The question of when a president can legally rely on an executive order, therefore, is the same as the question of when can the president bring into effect the executive power generally. Ultimately, there is no conclusive answer to this question. Even after two hundred years of precedent and judicial opinion, the nature and scope of presidential power remain astonish-

ingly ambiguous.
What this review demonstrates is that significant or controversial executive or ders are nothing new. It is important to place existing controversy in historical perspective, and to note that concerns about the scope of presidential authority are

often based on opposition to particular policies.

The disputes over the previous administration's use of executive proclamations to create new national monuments and otherwise implement unilateral policies have developed along these same lines: many of those who oppose the underlying policy raise questions about process and legality, while supporters argue that the acts are based on legitimate statutory or constitutional powers. Critics of President Clinton's orders and proclamations have asserted that he went well beyond the proper scope of presidential power. In 1981, though, critics of executive order 12291 were making the same argument short President Presid the same argument about President Reagan. And in 1793, critics of President Washington's Neutrality Proclamation made the same argument about him.

The dire warnings of presidential imperialism through executive orders are over-stated, and they serve not only to exaggerate the nature of the president's authority, but also divert attention from more serious issues involving government accountability and the development of unwarranted federal government power. Despite fears that executive orders can undermine popular sovereignty, it is also possible that they can *enhance* accountability, by creating a clear decision trail that leads directly to the President. Notwithstanding the often areane language and obscure provisions in many executive orders, the orders themselves leave no doubt about

who is speaking.

Executive orders are also subject to important checks. An order not based on a legitimate grant of statutory or constitutional power has no force, and the judiciary has stepped in to reverse improper presidential actions (as occurred with Clinton's replacement worker executive order). It is not a coincidence that many of the most important Supreme Court rulings on presidential power have involved executive orders, including Youngstown, Korematsu v. United States, Schechter Corp. v. United States, Cole v. Young, and Ex Parte Merriman. Judicial deference to presidential authority is substantial, but it is not unlimited.

Congressional action serves as another check. Particularly when the president is acting pursuant to a statutory delegation of authority, Congress clearly has the authority to prevail; the legislature's recent action overturning OSHA's ergonomics regulation is but one case in point. If, say, the 107th Congress successfully modifies the Antiquities act to restrict the President's ability to create new national monuments, or repeals the ban on assassinations included in the intelligence orders, or supercedes the executive orders on classification with a statutory framework, its success would not be viewed as a reshaping of constitutional foundations.

The ultimate check on executive energy is—and should be—political. Congress could step in to reclaim the ground it has lost to the executive, and the fact that it has not done so is much more a function of context than of any flaws in constitutional arrangements.

Mr. BARR. Thank you very much, Professor.

We will now be in the question period. I would like to first recognize the Vice Chairman, the gentleman from Arizona, for 5 minutes.

Mr. Flake. Thank you, Mr. Chairman.

Mr. Mayer, just to give some context, you do not feel that the

President did abuse his proclamation power?

Mr. MAYER. Well, that's not precisely what I'm saying. I'm saying that Congress would be well within its rights to modify the authority so the President could not do what he did. I understand why people were uncomfortable with the process.

Mr. Flake. Going in retroactively, then, say, in Arizona, for example, I mentioned we have one example of a monument being created where there was previous agreement for an easement for transmission lines and what not, that is up in the air now. Would Congress be within its rights to go in and modify that arrangement, then?

Mr. Mayer. Well, without knowing much about the specifics of that case, my understanding of the law is that, if the President based the national monument on authority pursuant to the Antiquities Act, Congress could reverse that by legislative action.

Mr. FLAKE. Can reverse that, then?

Mr. Mayer. I believe so.

Mr. Fein. Could I just add one caveat? It seems to me recent Supreme Court decisions would suggest, if there have been some reliance taken by private individuals through contracts or otherwise, on an outstanding, whether you call it an executive order or regulation, and then retroactively Congress seeks to change the rules of the game, that could expose the United States to liability, either as an unconstitutional taking or otherwise. So it wouldn't necessarily be cost free, but ultimately, if Congress wants to have its way, it could undo everything that the President did, President Clinton did.

Mr. Flake. Mr. Fein, your previous testimony mentioned that the President can be sued on things like this, and so-

Mr. Fein. Yes, he's clearly not immune from lawsuits. We know that from Jones versus Clinton and a whole host of Nixon precedents.

Mr. Flake. But when he has left office, then the office or action can be taken up as a takings issue, then?

Mr. Fein. If there's been reliance. There may not be a takings issue. It just depends on what's happened subsequently before Congress acts under the outstanding proclamation.

Mr. GAZIANO. In my view, if you don't mind me chiming in, there are more likely to be takings, compensation claims, based on the abuse of proclamation than reversing them. I doubt—Bruce is right, that there is this theoretical possibility that there may be a just compensation claim based on reliance, but there's much more likely to be a takings claim based on the potential leases that were extinguished. The existing proclamations did not extinguish valid mining leases that were already in operation, but there were some, at sort of the inception stage—they're in a netherworld—where a regulatory takings claim might be asserted. So this government may face just compensation claims based on the abuse of claims, so you're all's reversing of them I think would probably save the Treasury more money than—So I don't think monetarily that should be a significant concern.

Mr. Fein. I do think that Todd also has brought up another approach here, that falls short of maybe the stark effort by Congress to out and out reverse what President Clinton has done, when he suggested that, well, you can require the President to state reasons for why he's done things, and the U.S. Supreme Court has repeatedly said the Executive branch agencies can only sustain their action based upon what their arguments made in justification were,

not in something that they held secretly.

A statute that applied, that basically held the proclamation designation in abeyance until there was a statement, affirmative statement by the Executive branch of what were the reasons that justified, under the Antiquities Act, based upon scientific, aesthetic or what other values, justified the designation and the particular acreage, and then, once that had been done, exposing that to judicial review before the proclamation took effect, there I think it would be a way for Congress to approach and attempt to reverse what the President did, not by scrapping the Antiquities Act or by setting a precedent where Congress, on a case by case basis, second guesses the President, but says hey, wait a minute, this really wasn't done by turning square corners procedurally; the President never gave any reasons for this, he never gave any reasons why the particular acreage was there. Why don't we hold this in abeyance and have the procedures necessary to determine whether it satisfied the objectives. Many people may vote for that without hazarding the more stark precedent.

Mr. Flake. Thank you, Mr. Chairman.

Mr. BARR. Thank you. The gentleman from North Carolina, the Ranking Member, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I have been kind of looking at the language of the actual controversial declaration that Mr. Hansen, Representative Hansen testified about. I'm wondering whether perhaps, in the body of the proclamation itself, there may not be some recognition of things that this administration can do, because—I'm quoting now. It says, "The Secretary of Interior shall prepare, within 3 years of this date..." that was apparently September 1996 "...a management plan for this monument, and shall promulgate such regulations for its management as he deems appropriate.

Now, I take it the 3-year limitation applies to the management plan, not to the regulations, the way this is written—at least that's the way I would read that. So did the prior administration promulgate any regulations, and if they did, wouldn't those regulations have been governed by the APA, or would they not have been gov-

erned by the APA?

Mr. FEIN. I don't know whether the regulations were promulgated. Typically, when Congress gives a time deadline, it's honored more in the breach than in the observance.

Mr. WATT. I don't take the 3-year limitation to apply to the pro-

mulgation of regulations.

Mr. Fein. I understand, but I think you're referring not to the designation that caused the greatest exorcise by Congressman Hansen, but to one in—1996 was much earlier. I think all the other designations made under the 1906 Antiquities Act were in the last year of Clinton's presidency, and those are the ones, I guess, that have created more controversy than the 1996 designation.

Mr. WATT. I thought we were—I thought Representative Hansen was talking about the proclamation dated September 18, 1996, the Grand Staircase-Escalante National Monument's vast and austere landscape embraces a spectacular array of scientific and historic re-

Mr. Fein. Yes, that was one—

Mr. Watt. That's how it starts.

Mr. Fein. Yes, that was one. But I think was—

Mr. WATT. Okay.

Mr. Fein [continuing]. Was addressing the—

Mr. GAZIANO. I actually think, legally, that is the most problematic one, whether it—

Mr. Watt. So you're saying there was one subsequent to that? Mr. Gaziano. Oh, there are lots that were controversial also——

Mr. Watt. But I thought we started this hearing off talking about this particular one, so I'm trying to figure out whether there isn't, even within the context of this proclamation, the makings of this administration's ability to issue regulations that do about anything, I would think.

Mr. GAZIANO. There have been some regulations issue. I'm not

exactly----

Mr. WATT. Okay. Now, was that under the APA?

Mr. GAZIANO. What I was going to apologize for not knowing, and I apologize, is whether they were APA, what type of regulations, and whether—There's different types of regulations. There are four types of regulations, even under the APA, and some APA regulations require notice and comment, and some regulations don't require notice and comment. So I don't know what procedures they underwent.

But I think the short answer to your question is that there clearly are some things that this administration can do to modify the type of restrictions, and the Secretary of Interior, Secretary Norton, has indicated that they're considering this. So—

Mr. Watt. Okay. I didn't want to leave us with the impression that the prior administration has absolutely boot-strapped or hamstrung—I guess I'm using the wrong word—has hamstrung—this administration. I mean, it's just that I don't read this to be the case. It's not clear whether it would be done according to the APA or whether it would be done according to some other regulations. But this administration can issue regulations. It may not change the size, I guess. I would take it that that would probably take some act over here.

Mr. GAZIANO. I think the President can. Actually, everyone, the CRS report, and I think everyone agrees, that he can even change the boundaries. The only——

Mr. Watt. I hear you say that, but if the prior President was acting outside the scope of his authority to do this, wouldn't this President be acting as far outside of his authority to make a revision?

Mr. GAZIANO. With your indulgence, I would be glad to say "why not?" There are three pending lawsuits challenging the legality of what the President did. The President has a responsibility to either defend the litigation or to confess error. In my view, the President needs to be honest in taking a litigation position. The—

Mr. Watt. Right now that would be the new President, right? The Justice Department would——

Mr. GAZIANO. Correct. The new President assumes the responsibility—

Mr. WATT. So they could go in and basically roll over on the case, right?

Mr. GAZIANO. Rollover, admit, if they think that there is a seri-

ous legal error.

But even apart from that, I think everyone agrees that this President, because it's happened in the past, and it's been upheld, and I think—I forget whether it was Bruce or Professor Mayer, said that there has been restrictions. There have been changes in the boundaries. So that one of the other—I'm with you, in a way. I think this administration can do a lot to fix the current designations that were problematic. They can reduce the acreage; they can change the restrictions. I think, for those that were done unlawfully, they can actually rescind them.

Mr. WATT. I've got some more questions, but I don't want to pro-

long this.

Mr. BARR. We'll have another round.

The gentlelady from Wisconsin is recognized for 5 minutes.

Ms. BALDWIN. Thank you, Mr. Chairman. Just a couple of quick questions.

Professor Mayer, you were indicating, as an example of congressional activity overturning executive action, the ergonomics rule. We did that, or took that action, pursuant to the Congressional Review Act. It's the first time that Congress has used the CRA, as I read the history of that.

In some of the explanations and background pieces on why it hadn't been used before, of course, if you were to use it during the administration that promulgated the rule or the executive order, presumably you would have to have veto-proof margins in order to move forward with something and we had the unique moment of a change in administration.

I'm wondering if there are examples in your research, that you located, where congressional actions have overturned an executive order or proclamation during the pendency of the administration

that made such an executive order or proclamation?

Mr. Mayer. Probably the best example would be when President Clinton, I believe it was in 1998, issued an executive order which rescinded—it was on federalism and consultation with State and local authorities, which reversed, revoked the Reagan-era order. There was a lot of opposition, not only within Congress but also among community groups and local governments and State governments, many of whom noted with some irony that the executive order promising consultation was drafted and released without any consultation.

Congress passed an appropriation's rider that prohibited spending any money on it, and because of that, and I think strong political pressure, within, I think, a month or so, President Clinton issued another executive order revoking the one that he had just issued, which had the effect of reinstating the order that President Reagan had. So it does happen.

I think we were talking about this before, that the Presidents don't issue executive orders without any sensitivity to context or what the reaction might be. In that sense, the political context serves as an important check. But it's unusual, though it does happen

Mr. FEIN. I think somewhat of a "first cousin" to that was when the President came in and initially announced an intent for his "don't ask, don't tell" policy in the military, and then, really before it ripened into a formal executive order, Congress, by statute, wrote in what their view of "don't ask, don't tell" ought to mean and that was the end of that.

Ms. Baldwin. A question about some of the internal reforms that Mr. Gaziano indicated could occur within the White House.

First of all, are you talking about internal reforms by executive order, or just policies, informal policies, that might guide the Executive Office?

Mr. GAZIANO. Both operate now, both, two executive orders govern the issuance of executive orders, and as Professor Mayer in his scholarly testimony, and I think probably his book, which I'm eager to read, indicated sometimes they're not always honored. But, by and large, when I help supervise the practice of reviewing presidential executive orders, it was both the sort of informal and formal.

What I'm recommending, anything Congress could do—and there are certain constitutional limits—the President can go further. He has actually more flexibility to hamstring himself, and actually future Presidents, until a future President changes his or her mind. For example, requiring—almost anything, I should say. He can require—Before I sign any executive order, I require you to certify to me that it is lawful, that sort of part of the process, and that it cite what my authority is, in such clear terms as "I hereby designate."

Probably one thing you can't do, though, is increase standing by removing statutory standing requirements. A part of standing doctrine is constitutional, a part is statutory. If someone doesn't have statutory standing to sue, he probably wouldn't want to allow suits. He can—to be brought against—to increase the number of suits that can be brought against him. That's an area where I think you all have almost exclusive authority to think through and maybe work out with the President.

Ms. BALDWIN. I don't know if I have much additional time, but I would be happy to yield it to Mr. Watt to finish his questions if I do.

Mr. BARR. The gentlelady has 22, 21, 20 seconds. We will have another round of questions.

Mr. Watt. I'll just wait.

Mr. BARR. Okay, thank you. I recognize myself for 5 minutes.

Professor Mayer, I was intrigued by, I think, the end of your oral testimony, reflective of the last paragraph of your written testimony, where you say, "The ultimate check on executive energy is—and should be—political. Congress could step in to reclaim the ground it has lost to the executive, and the fact that it has not done so is much more a function of context than of any flaws in constitutional arrangements."

I agree with most of what you're saying, with the exception of the phrase "and should be". I don't think that the ultimate check on executive authority should be political. It should be legal. But I certainly agree with you that Congress could do a lot more than it has.

I'm just wondering why, in your view, why hasn't Congress stepped in? Is it a lack of interest, a lack of backbone, a lack of understanding of the issues? Why is it that—For example, even when the very unusual step was taken of having the former President's executive order on striker replacement challenged successfully in court, and even though there was a lot of discussion, certainly on our side of the aisle at that time in challenging it legislatively, nothing was done. Why is Congress so hesitant to assert its prerogatives when challenged, directly or by implication, by these executive orders, and is this something that is historically new or has Congress historically deferred to the President on these types of issues?

Mr. Mayer. Well, the reason is primarily institutional. Congress is a majoritarian institution that requires action on behalf of 535 people and two separate institutions. Often it faces the possibility of a presidential veto, which raises the threshold from 50 percent plus one to two-thirds. I think that serves as the biggest impediment to Congress asserting its prerogatives, because when the President is able to act, the President, as more or less a unitary actor, can move swiftly and basically change the status quo to a new set of conditions to which Congress would have to affirmatively respond in order to overturn.

I think there have been a lot of examples of significant executive orders that generated quite a bit of controversy in Congress. One example is President Reagan's regulatory order, which generated a lot of attempts to try to reverse it. It took several years. And essentially what Congress was able to do was extract some promises

about process and confirmation and so forth.

But, to me, that's the biggest problem, that once the President issues an order that's pursuant to either his constitutional authority or to a statute, much of the time, in order to formally undo it, Congress has to pass a law. The legislative veto doesn't work any more, or the one-house veto. That, almost by definition, makes it very difficult for Congress to step in and take action.

Mr. Fein. I think another reason—

Mr. BARR. Let me—Hold on. Just a second, Mr. Fein. I just want to raise one other issue that I would like—and I was going to direct

this to you.

On January 20th, Andrew Card issued a memorandum for the heads and acting heads of Executive departments and agencies. The subject was a regulatory review plan. Are you familiar with that memorandum that Mr. Card issued?

Mr. Fein. Generally, yes.

Mr. BARR. Can you tell me—Do you know what was the practical impact of that, and why has not the Bush administration thus far seem interested or willing to move beyond this memo in challenging or asserting its prerogatives to do more than simply review prior to existing regulations or executive orders, and actually take steps in those areas to undo them or modify them? Or are they simply satisfied with what went on before?

Mr. Fein. The general idea of the memorandum was to place in abeyance those rules and decisions of the President or the agencies that hadn't taken legal effect yet. Some of them are very complicated and it takes time to review them. Others, if they are to be undone, require notice and comment in rulemaking under the Administrative Procedure Act, and that means you've got to come up

with good reasons to justify revoking what a previous President

I remember in the Reagan years there was an attempt by the Department of Transportation to undo the automatic seatbelt rule of the Carter administration. It was reversed in the U.S. Supreme Court because you didn't give good enough reasons for doing this, because those regulations are subject to the APA, every bit as

much in the promulgation as in the revoking.

And then there's the additional reason that the White House is politically sensitive like the Congress is, and some of the regulations they may conclude, after they've had a time to assess, would be unpopular if they sought to revoke them. They have many things on their agenda at present, and some of these regulations don't jump to the front of the queue and so it seems to be agonizingly long for those who are directly interested.

But I don't think—you know, from the time of the memorandum, here we are 3 months later in a presidential administration that came on a little bit slow because of the prolonged presidential legal and judicial jugglery and is exceptionally worrisome or dubious.

Mr. BARR. Thank you.

Mr. Flake, you are recognized for 5 minutes.

Mr. Flake. No further questions, Mr. Chairman.

Mr. BARR. I'm sorry. I should have gone to the Ranking Member. Mr. Watt, you're recognized for 5 minutes.

Mr. Watt. Let me pick up on this point.

The Card memo, basically the Bush administration basically suspended the application of a number of regulations as I understand it; is that right?
Mr. FEIN. Tried to freeze them.

Mr. Watt. Freeze them, froze them.

Mr. Fein. Exactly.

Mr. WATT. Why would that not be as much a violation of the spirit of the APA as an actual reversal? I mean, basically what you're saying is you're not going to apply the rules that have been

Mr. Fein. Well, if I can borrow from a famous, or infamous, precedent, it depends upon what the meaning of "freeze" is.

[Laughter.]

I mean, you're right, Mr. Congressman. Insofar as the regulations had already got into the Federal Register and had been printed, those are regulations. You can't freeze those. But my understanding, and from reading the Card memo, that there were regulations that the decision-making had been completed, to say we want "x", but they hadn't actually got all-

Mr. WATT. So it actually made a distinction.

Mr. Fein [continuing]. To dot the I's and T's crossed, so it made

it into the formal U.S. Code, something like that.

Just as Congress may enact a statute, but it has to go to the Clerk and then be presented to the President, those sorts of things, and it takes some time. President Clinton was so busy in his last hours doing various and sundry things that apparently a fair number of these less-pressing and urgent matters—they weren't pardons, after all—maybe got caught up in the log jams.

Mr. Watt. Any other comments on-

Mr. GAZIANO. There's even a third category. There is generally a 3-day lag, at least, between sending something over to the Federal Register and it actually being printed. But, in addition to that, the Card memo froze—Actually, there's more than three categories. So different action was taken on them.

Proposed rules, there was an instruction to sort of freeze certain of those, except those that were required by statute to be promulgated on a certain date. There was another category of rules that were in their final form but the effective date was some day in the future. Pursuant to your Congressional Review Act, one segment of that Act and some other legislation requires—and there is some general provisions of the APA—that for certain rules, require a 30day effective delay. The Card memo, as to them, extended the effective date. The action—and there are some Supreme Court cases, and two D.C. Circuit Courts of Appeals cases, on how long you can extend them.

The administration has to make a decision—can't extend them indefinitely—needs to make a decision and republish in the Federal Register with regard to that category. We're either going to go forward with them or we're going to begin a process of reconsidering them for good reasons, and then go through the notice and comment procedure as well.

Mr. MAYER. And there's an additional category of executive action, which all Presidents try to do, and that is, when they get into

office, to put their stamp on policy in a hurry.

One of the first things that the current President did upon taking office was reverse a number of Clinton administration policies on-for example, the Mexico City policy, various executive orders dealing with——
Mr. WATT. Those are things that are short of executive orders?

Mr. Mayer. These were-

Mr. Watt. Or just policies, or is there some category-

Mr. Mayer. These were acts that were, I think, committed solely to presidential discretion and not formal agency regulations. On those things, the President can move more quickly. But it's also the case that President Reagan, when he took office in 1981, issued a similar moratorium on regulations that had been promulgated in the last few months of the Carter administration.

Mr. Watt. Let me just get one final question in, just for purposes of clarification. I'm going back to this 1996 proclamation. The President says it applies only to Federal lands, lands that belong already to the American people.

Does that make a difference?

Mr. GAZIANO. Well, it does. The Antiquities Act, and many of your land management laws, apply to Federal land. But in my mind, that doesn't really affect the central question. It would have been obviously worse, and even more illegal, if he tried to seize some other people's land.

But even with regard to Federal land, you have a variety of statutes—the Wild and Scenic Rivers, the National Parks, various other—and the issue still with regard to Federal lands is whether the Antiquities Act purposes and size limitations were met, even

with regard to Federal lands.

As Bruce has explained the converse—and I mentioned in response to Representative Flake's question—by freezing certain development on Federal land that had preexisting mining, grazing, timber, logging and other restrictions on it—some of that was allowed to continue, by the way, with these proclamations—that changed the character, withdrew those lands, withdrew the character of those lands, and may expose the United States to some claims for just compensation.

Mr. WATT. Thank you, Mr. Chairman.

Mr. BARR. Thank you.

The gentlelady from Wisconsin is recognized for 5 minutes. Ms. BALDWIN. Mr. Chairman, I have no further questions. Mr. BARR. Thank you. I recognize myself for 5 minutes.

Professor Mayer, I think you said that there's been a long line of Presidents that have used executive orders to "assert control

over administration policy."

Given that that seems to be, in your view—and I don't want to put words in your mouth—but if that is your view of the various presidential directives, proclamations and executive orders that we're talking about here, what was there in Proclamation 6920, on the Grand Escalante, that served to assert control over administration policy?

Mr. MAYER. Well, the argument I was trying to make through that statement is to place any particular action in the context of this is something the Presidents have long done to try to control

a policy in a variety of different ways.

As Bruce mentioned, the authority to issue executive actions come either pursuant to constitutional or statutory authority, and oftentimes—and this issue over the Antiquities Act is not the first time this has happened. But Congress will commit an act to the discretion of the President, specifying some standards by which the President must act in order to promulgate decisions, whether it's—another example would be the Federal Property Administrative Services Act, which gives the President to issue regulations to enhance the economy and efficiency of government contracting. That was the authority that President Clinton cited in his replacement workers order.

It is very common for Presidents to really push the envelope of

those delegations.

Mr. BARR. But isn't it—and I understand that, and I understand that all Presidents virtually have used various executive directives to, as you say very eloquently, assert control over administration policy.

But what we seem to have had, in particular with the prior administration, and in particular Proclamation 6920, is something that went far beyond asserting control over administration policy, which I think is a very legitimate exercise of executive authority.

Is there anything that troubles you about Proclamation 6920? Mr. MAYER. Well, I think it represents a difference in degree,

Mr. MAYER. Well, I think it represents a difference in degree, certainly. I think the size—and, frankly, I think it's arguable about whether that was intended by the Antiquities Act, and there are obviously going to be disputes over the wisdom of that decision.

But in another context, it's an example of a President really pushing the envelope, and it's not the first time that has happened.

You know, I am not a public lands lawyer; I don't know enough about the specifics of that particular case. In listening to Representative Hansen, it's understandable why there are questions

arising over the process.

But I don't think that that represents, on its face, an absolute case for a violation of the law. I think it falls into an area in which there are questions about process. But that authority has been delegated and this is what a President can do. To push the envelope and interpret those delegations of authority in ways that—

Mr. BARR. If Congress delegates authority to the President to perform certain acts within certain bounds, such as ensuring that the designation is the minimal amount necessary to achieve a specific result—that is, identifying and designating a monument. Congress has not ceded to the President to do whatever he wants under the name, as long as he uses the name "I'm doing this under the authority delegated under the Antiquities Act". I mean, Congress certainly reserves, if nothing else, the implied power to step in and say no, you've gone too far with that, don't they?

Mr. MAYER. Well, it seems to me that would be—that Congress could assert that authority, but they would have to do that through

the legislative process.

On the issue of the smallest area, that's somewhat of a fluid standard that's open to judgment. If the statute had said that, as has been recommended, that there be an acreage limit, that the President may not designate an area larger than 50,000 or 5,000 or 100,000 acres, then it would be clear that a designation of 1.8 or 1.9 million acres would exceed that threshold. But without that kind of concrete marker, I think we're in sort of a grey area, where you can argue about whether or not it was, in fact, the smallest area consistent with the protection of that, or whether it wasn't.

I don't know if that's responsive to your question.

Mr. Fein. Mr. Chairman, I think—

Mr. BARR. Can you really argue that with a straight face?

Mr. Mayer. Well, I guess, what I can say with a straight face is that I understand why there are differences of opinion about this. I can also say with a straight face that I don't see it as an absolute, on it's face, violation. But I can appreciate the arguments that are made, about why it may not have been consistent with the spirit and why it may have, you know, sort of been an eye-opener. I think it would be perfectly legitimate for Congress to respond by changing the statute, to make sure that doesn't happen again. And the fact that the legislation last session, to require public participation and so forth, passed by such overwhelming majority, suggests there is a lot of support for that.

Mr. BARR. Did you have something to add, Mr. Fein?

Mr. FEIN. Yes. I think, Mr. Chairman, you have hit upon a kernel, a very critical point here, and it doesn't necessarily relate to

just the Clinton administration.

I recall when I first came to Washington, just at the time the Nixon administration's inauguration in '68, at that time they set up the Domestic Policy Council. Since that time, I think there's been a slow accretion, whether you have Presidents who pledge cabinet government or not, of power, policy power, in the White House, nominally through the various domestic councils, but also the Na-

tional Security Council taking over a lot of the decision making that formerly was made at the State Department.

Remember at one time Henry Kissinger was both National Security Adviser and Secretary of State, and when he was there as just the National Security Adviser, William Rogers, who was Secretary

of State as a titular matter, was basically his "cup bearer".

The consequence of this, I think, has been over the years a vast, at least incentive, an ability of the White House in making decisions that formerly were made at the agency level, to circumvent the customary government in the sunshine that operates when an agency decides: notice and comment, rulemaking, decisions have to be on the record; you have the Government in the Sunshine Act that requires certain consultations to be made open to the public.

That seems to me an institutional problem that's not going to fade away, whether we have George W. Bush for two terms or one term, and you have someone else, because the nature of politics, I think, and the growth in power of the presidency makes the White House sort of the coveted place to serve. And if you serve in a coveted place, you've got to do things that make you feel that you're

strong and powerful. So you make up these regulations.

I don't want to exaggerate these things, but having worked around the White House and in politics for over two decades, there are those sort of subconscious pressures. The same reason why the pardons—I mean, when I was at the Justice Department, the idea that you would go directly to the White House for a pardon and not go through the pardon attorney and get a recommendation from the Attorney General, it would just be outlandish. And yet, it's happened, and that seemed not to be troubling to anybody, including former White House counsels.

So that's something that I think justifies holding hearings on the sensibility of making the White House, the Executive Office, an agency under the APA. Maybe you need to treat it a little bit dif-

ferently for some reasons.

But certainly on its face, and because we have two Supreme Court holdings that say that, under the existing APA, the White House is not an agency, it certainly seems to me to address a problem that's not just here for this day and train only, the Antiquities Act, but really is going to be something that will encroach ever increasingly on congressional power unless there is a tougher oversight and subjection to what that White House does that doesn't obtain at present.

Mr. BARR. Thank you.

Does anybody else have other questions? I had a couple more, but I don't want to monopolize the time if other members have questions.

Mr. Watt. I was just going to observe, Mr. Chairman, that Mr. Fein may, in fact, have put his finger on the reason that this administration has not acted as promptly as some people would have expected, because they may well see that there will be a time when they will use all of this centralized power in their own ways—

Mr. Fein. They'll have successors.

Mr. WATT. So it's kind of hard to react as quickly as some people might under those circumstances. That's just an observation.

Mr. BARR. I think it's an accurate one.

Mr. Gaziano, are you familiar with the 1938 Attorney General opinion that relates to the Antiquities Act?

Mr. Gaziano. I am.

Mr. BARR. This had to do with the Castle Pinkney National Monument established by the President in 1924 under the Antiquities Act. The question arose in 1938 apparently as to whether or not a subsequent President had authority to abolish a monument previously so designated.

The Attorney General's opinion says, "While the President, from time to time, has diminished the area of national monuments established under the Antiquities Act," and then there's some other

language, "it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.'

Let's assume that that's accurate, that that's sound legal reasoning. Is there other, though, independent authority, or authority elsewhere, either express or implied, that would give a President the authority to abolish a monument entirely under the Antiquities Act—a subsequent President, let's say.

Mr. GAZIANO. I don't think there is other statutory authority. With due deferences I do to the Attorney General's opinion, I think it still might be an error with regard to even rescinding normal monuments.

But it might be right, for this reason. The President's power to make designations doesn't flow from any of this constitutional authority; it flows from your authority under Article IV, section 3, Clause 2, to regulate the Federal lands. If you all had made clear in the Antiquities Act that, once you make a designation, Mr. President, they can't be revoked, if you've been clear about that in 1906, then that would be final. So the Attorney General's interpretation is plausible.

My reason for suspecting, without going into why I think that might not be the case, at least with regard to the designations that were improper, I think a President today, a current President, is in the same position as a court, when there is litigation contesting the legality of prior designations. I think, at least with regard to those, the President can confess error and can rescind them. So that's a sort of-

Mr. BARR. Why hasn't there been a challenge to Proclamation 6920, the Grand Escalante?

Mr. GAZIANO. There are three lawsuits—and again, I apologize for not knowing exactly this month where they stand. One of them had some standing problems as to the parties. But I think those three cases, to my knowledge, are still pending.

So this administration has got to make a decision on whether to defend it. And normally, the President's obligation, when it's a challenge to a statute, is to try to defend if any reasonable argu-

ment can be made. I think that's a wise decision.

But with regard, I think, to a prior executive action, a President doesn't have the same obligation to defend it, if any reasonable argument can be made. I think he has more latitude in those cases to confess error, to say that-

Mr. Barr. In other words, in those areas that relate to the President's exercise of either an expressed constitutional grant of authority or a power implied or inferred directly from that.

Mr. GAZIANO. Right. This challenge is not to the Antiquities Act itself. He would have to try to defend the Antiquities Act's constitutionality, if a reasonable argument could be made. And there is

one, so he would have to defend it.

But when the challenge is to the President's lawful exercise of that power, I don't think he's obligated to make every reasonable argument he can, that the prior President acted lawfully. I think he can straight up answer the question—actually, has a duty, it seems to me, in responding to the litigation that the counties have brought, and I think local government was one. If you want, I have it somewhere tabbed who the three suits are pending.

Mr. BARR. If you could furnish that.

So really what you're saying then is, the answer to my initial question regarding the 1938 Attorney General opinion, is—and referring just to his final conclusion, that it does not follow from his power so to confine that area that he has the power to abolish a monument entirely—what you're saying is, yes, you believe that's an accurate reflection of presidential power and the law—

Mr. GAZIANO. It's a close case, I think——

Mr. BARR [continuing]. Insofar as the initial exercise or the initial designation, was a lawful exercise or lawful designation?

Mr. GAZIANO. I think it's a close case. I think good arguments—I try to acknowledge where I think there is some open issue there. I don't think the Congress was clear in 1906, that you can't revoke it. And the Attorney General opinion is due what deference its persuasiveness has on courts and other people outside the Executive Branch. I find it somewhat persuasive, but not completely persuasive

So, actually, I think maybe there's a 50-50 chance that a current President can revoke any prior designation. If you all had said he can't, he can't. But you all weren't clear, so you have to infer from the 1906 Act whether he can revoke any prior lawful designation. I think that's a rather close question.

Mr. BARR. Ultimately, I guess—Professor Mayer, we get back to your point, that politics really dictates a lot of this; that if a subsequent administration wants to, sort of on the other side of the equation, push the limits, what it can do to overturn or rescind a prior executive action, they certainly can do so. But a lot of times, or I guess most times, they don't. Maybe it's a political—

Mr. MAYER. I'm not sure—A lot of times they do, and we've seen that in the first month, first several months of this administration. You saw that in the first months of the Clinton administration—

Mr. BARR. I mean, the current administration really has not

moved aggressively to undo any prior executive action.

Mr. MAYER. Oh, actually, they have. They have reversed Clinton's decision on the Mexico City policy; they reversed a Clinton era order that—the current order now requires notification of—I forget what the exact language is—but notification that members of a union can ask for a refund of the portion of their dues that goes for political activities; reversed an order on the...here I'm sort of searching my mind—on whether or not unions have an advantage when competing for Federal contracts in particular areas. There are a variety of examples from many administrations about them.

The very first thing that Clinton did when he took office in January, 1993, was to reverse a series of Bush administration orders dealing with fetal tissue research and interpretation of the Title IX—abortion counseling and so forth.

But to get to the point about pushing the powers, or pushing the envelope, it's not inconceivable to me that a successor President could push this issue of simply trying to or asserting the power to reverse a proclamation or the establishment of a national monument, because right now we've got a 65 year old opinion of the Attorney General which I think establishes that the power to designate doesn't automatically confer to the power to disestablish. But that's something that a President might be willing to take on, and that, to me, would be part of a continuing pattern of Presidents of both parties really probing the boundaries of their executive power and to see how far they can push it to accomplish their goals and to assert control over policy.

Mr. BARR. Thank you.

Just one final question, Mr. Fein. You mentioned a couple of times the APA. Is there specific language that you think would be appropriate to consider legislatively to look at using the APA as a vehicle to perhaps clarify and assert some limitations on the problem that brings us here today?

Mr. Fein. Well, if you amended the language to say that, you know, unless Congress specifies otherwise, an agency under the APA includes the Executive Office of the President, because there may be certain unique features of the Office of the President that you wouldn't want to have all APA rules apply to, then the rulemaking procedures apply to the Executive Office, which would include decisions relating to proclamations, executive orders, or otherwise. You leave in there the possibility that, on a case-by-case basis, Congress may carve out an exception for the President. But the ordinary rule is, yeah, you want government in the sunshine every bit as much in the White House as you want in the various agencies. I find it difficult to conclude why that wouldn't be appropriate.

I recall—I believe yourself had a problem under the Privacy Act claim, was it an agency or not, you know, under the Freedom of Information Act, to gather information that the Executive Branch presumably may have assembled for purposes, nefarious or otherwise. You know, we weren't able to get it because of the narrowness of at least the prevailing understanding of what an agency was subject to the Privacy Act.

But I think our country has thrived, despite the possibilities of abuses, on strong reason to believe government should be in the sunshine, unless there's a really strong reason why it shouldn't be. Too many-right now, the White House office functions too often times not in the sunshine but in the old back door situations.

Mr. Barr. Is—the legislative vehicle that you suggested, amending the APA with regard to the Executive Office, is that, in your view, a better way of addressing this than some of the other legislative remedies that have been proposed over the last couple of years, including a couple that have been before this Subcommittee?

Mr. Fein. I'm not sure I would choose that, because it does—it's going to limit to some degree flexibility that a President might find

productive in some circumstances.

You know, the equally, it seems to me, compelling idea of requiring the Executive Office of the President to present before Congress at least 90 or 120 days, 180 days in advance of any decisions taking effect, basically requiring a clear notice of what's going to happen, that then gives Congress ample time and the press ample time to mount political pressure, so that the President either backs down or Congress has time to enact a statute that overrides the President, that might work. We really haven't tried it in a serious way, so we don't know. But if that political response is satisfactory, then you wouldn't need to go to what is a more stark and less flexible effort and making the Office of the President an agency under the APA, with all the attendant baggage.

Mr. GAZIANO. Mr. Chairman, if you don't mind, there would be some constitutional issues of grave concern if you did try to apply all of the APA to the Executive Office. The Supreme Court case, Franklin versus Massachusetts, which is the most recent decision

that says they're not covered by the APA, did so.

When a plain reading of the text might lead to the opposite conclusion, the Supreme Court said we're going to interpret the APA not to include the Executive Office of the President or the President because that would raise serious constitutional issues. Without elaborating on what they are, unless you want me to, I think, at least in application, in some instances, it would create constitutional problems.

I think this Congress has in the past recognized a sort of small protection to those who are closest advisers to the President, out of deference to him, with the same regard you have to your senior staff members. You have a sort of privacy. You operate on the floor in public, but all of your discourse and deliberations in your chambers, in your office, are not subject to full disclosure, either. So I think those are at least—It's a good idea, but it should be carefully done, I think.

Mr. BARR. I agree. And I don't think Mr. Fein was suggesting

Mr. Fein. No, and I think the way——

Mr. BARR [continuing]. Everything that happens within the Executive Office of the President would be subject to the APA.

Mr. Fein. Right. Well, it would be those that culminated in rules, as defined in the—something that's the equivalent of a rule or an adjudication. And the way in which Congress has addressed the problem, that I think Todd rightfully raises, is simply to put in "except where the Constitution requires otherwise," so and so and so and so. That's what they did with certain national security wiretap oversights, and that simply is an indication of Congress that there may be a constitutional problem, and if the court does find one, then interpret the statute to exclude that particular instance.

Mr. BARR. Thank you.

Are there any other questions from other Subcommittee members? Anything else that any of you all would like to impart to the Subcommittee?

Mr. Fein. Well, if you just want a historical footnote that's somewhat humorous with regard to the Attorney General's opinion, there was one of our former Attorney Generals who became Supreme Court Justice, Robert Jackson, and he had advised President Roosevelt on a certain issue relating to the military and had given an Attorney General opinion. It related to whether aliens could be

drafted under the particular law.

He subsequently became a Supreme Court Justice and sat on a case challenging the legality of his Attorney General opinion. He wrote a concurring opinion in this case, called Christianson, in which he said "Well, on second thoughts—" he had looked at what he had done previously, and he was astonished that a man of his intelligence ever could have been guilty of such foolishness and voted that he was clearly wrong. So Attorney General opinions aren't always found in Heaven.

Mr. BARR. That's probably the last Supreme Court opinion that

was so frank. [Laughter.]

Thank you. On behalf of the Subcommittee, I would like to thank the witnesses for being here today. If there is any more material that you all would like to submit to us, please feel free to do so.

Counsel, is there any time limit within which they would do that, to include it in the record? Within 7 days. The record will remain open for 7 days.

Thank you all very much. We stand adjourned.

[Whereupon, at 1:36 p.m., the Subcommittee adjourned.]

### APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

### STATEMENT OF

### K.C. McALPIN EXECUTIVE DIRECTOR

### **PROENGLISH**

FOR THE

# COMMERCIAL AND ADMINISTRATIVE LAW SUBCOMMITEE OF THE HOUSE JUDICIARY COMMITTEE

Hearing on Thursday, March 22, 2001

This statement is to convey ProEnglish's concerns regarding Executive Order 13166: "Improving Access to Services for Persons with Limited English Proficiency," issued on August 11, 2000.

"Language is perhaps the strongest, perhaps most enduring link which unites men"
--Alexis de Tocqueville

#### INTRODUCTION

Mr. Chairman, thank you for the opportunity to present this statement of the views of ProEnglish on Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency." My name is K.C. McAlpin, and I am the executive director of ProEnglish. ProEnglish is a national member-supported public interest organization that seeks to make English our official language and preserve its role as the common unifying language of the United States. ProEnglish receives no federal grants or financial assistance of any kind.

Let me take this opportunity to thank you for your leadership in the battle to preserve our nation's unity in the English language, and for holding this hearing on the impact of recently issued executive orders, including specifically Executive Order 13166.

### **DESCRIPTION OF EXECUTIVE ORDER 13166**

President Clinton issued Executive Order 13166 (E.O. 13166) on August 11, 2000. Its stated purpose is to improve access to government services for persons with Limited English Proficiency (LEP) e.g. non-English speaking persons, by requiring that all recipients of federal financial assistance take reasonable steps to provide meaningful access to their services for LEP persons. The authority claimed for issuing E.O. 13166 was Title VI of the Civil Rights Act of 1964, which bars discrimination on the basis of "national origin." Accompanying Department of Justice (DOJ) Policy Guidelines state that "the failure to address language barriers" may be attributable to "invidious discrimination on the basis of national origin and race."

E.O. 13166 directed all federal agencies to develop and begin implementing plans to carry out the order within 120 days and to file such plans with the DOJ as depository. It further instructed all agencies providing federal financial assistance to draft policy guidelines for all recipients of such federal assistance and submit their guidelines to DOJ for review and approval.

Mr. Chairman, the following summarizes our major concerns with E.O. 13166

### 1. THE AUTHORITY FOR ISSUING E.O. 13166 IS NON-EXISTENT

When Congress debated and passed the Civil Rights Act of 1964, the disparate impact of English fluency was never discussed or included in the meaning of "national origin" discrimination. And that was for a good reason. It is self-evident that a person can choose to learn a new language, but they can never change their national origin. And, except for narrow requirements in education and a single exception now on appeal before the U.S. Supreme Court, <sup>1</sup> the courts have rejected repeated attempts to equate the failure to provide services in languages other than English with national origin discrimination.<sup>2</sup>

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).
 Soberal-Perez v. Heckler, 717 F.2d 36, 42-43 (2nd Cir. 1983), affirmed in Toure v. United States, 24 F.3d 444, 446 (2<sup>nd</sup> Cir. 1994) (per curiam); Carmona v. Sheffield 475 F.2d 738, 739(9<sup>th</sup> Cir. 1973); Frontera v. Sindell, 522 F.2d 1215, 1218 (6th Cir. 1975); Commonwealth v. Olivio, 369 Mass. 62, 337 N.E.2d 904, 911 (1975); Castillo v. California, 2 Cal.3<sup>rd</sup> 223,242; 466 P.2d 244 (1970).

Nevertheless, by claiming to be only interpreting the intent of the prohibitions on national discrimination contained in Title VI of the Civil Rights Act, the executive branch evades the requirement to have Congress authorize a law that is certain to have enormous fiscal, operational, and juridical implications.

# 2. THE ORDER HAS ALREADY RESULTED IN VAGUE, ARBITRARY, AND INCONSISTENT STANDARDS OF COMPLIANCE

Several federal departments have issued regulations and guidelines to implement E.O. 13166 that create standards of compliance that are vague, arbitrary, and virtually impossible to meet. These in turn will create levels of risk and confusion that will impair or handicap the ordinary operations of innumerable government agencies and private contractors.

For example, DOJ guidelines state "Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access." Department of Treasury regulations repeatedly assert that there is no "one size fits all" standard for Title VI compliance, and state that recipients of federal aid expose themselves to liability if, for example, they suggest or encourage LEP persons "use friends, minor children, or family members as interpreters."

The scope of E.O. 13166 is almost universal. Treasury regulations state that it applies to "All entities that receive federal financial assistance from Treasury either directly or indirectly, through a grant, contract, or subcontract" including the recipients of federal loans, donations of federal property, or any other form of assistance.

Implementing regulations issued to date repeatedly are full of vague and uncertain phrases such as "reasonable steps," "meaningful access," "to the maximum extent practical," and "meaningful participation." There are arbitrary and inconsistent standards. DOJ regulations state that, depending on circumstances, signage must be in at least 3 languages but complaint forms must be in at least 5 of the most commonly spoken languages and consideration given to translating into the 15 most commonly spoken languages. Outreach materials on the other hand must be translated into the 10 most commonly spoken languages and consideration given to translating such material into the 30 most commonly spoken languages.

In a nation in which 97 percent of the population speaks English<sup>3</sup> it is obvious that non-English speaking persons will be under some handicap with regard to communication. Yet Treasury regulations state "Services denied, delayed, or **provided under adverse circumstances** for an LEP person may constitute discrimination on the basis of national origin under Title VI."

Treasury regulations make covered entities responsible for the competence of translators they may employ and warn that such responsibility extends beyond things like formal certification to include assuring "sensitivity to the LEP person's culture."

Taken as a whole, the regulations create a standard of compliance that is burdensome, vague, arbitrary, and virtually impossible to meet.

<sup>&</sup>lt;sup>3</sup> 1990 Census.

# 3. E.O. 13166 WILL HAVE AN ENORMOUS FISCAL IMPACT AND CONSTITUTES A HUGE UNFUNDED MANDATE FOR STATES AND LOCAL GOVERNMENTS

By requiring translations and oral interpreter services to be made available, depending on circumstances, in the 300 plus languages that are reported to be used in the United States according to the Census, E.O. 13166 will add enormously to the cost of government operations. A measure of the fiscal impact can be gauged by the fact that it costs the government of Canada, a country roughly a tenth of the size of the U.S. in terms of population, an estimated \$1 billion annually to provide the translation and interpreter services needed to conduct its business in just two official languages.<sup>4</sup>

Recipients of direct or indirect federal assistance means virtually every state and local government agency in the country and will therefore impact local schools, hospitals, health clinics, libraries, parks, police and fire departments, as well as countless county and municipal agencies. Already, the California Medical Association is protesting that the financial burdens of compliance may force already financially strapped doctors and community hospitals to stop seeing indigent, non-English speaking patients. Similar objections have been raised by over 40 medical societies including the Association of American Physicians & Surgeons.

Mr. Chairmen, stripped of its rhetoric, E.O. 13166 represents an effort to transfer the entire hidden cost of not speaking English from LEP persons to taxpayers. The fact that such an order would be issued without the explicit approval of Congress or any other legislative authority is clear evidence of the violence E.O. 13166 does to the Constitution and the separation of powers doctrine on which our democracy depends.

### 4. E.O. 13166 WOULD FORCE A HUGE INCREASE IN THE SIZE OF GOVERNMENT

As mentioned, the scope of E.O. 13166 is not limited to written translations of an unknown number of languages but specifically requires that oral interpreter services be made available. Regulations specifically reference the hiring of bilingual employees and staff interpreters. To provide access to services equivalent to that obtained by individuals able to speak English would require the hiring of tens if not hundreds of thousands of interpreters and translators. This would greatly expand the number of employees at all levels of government and create barriers to employment for persons who were not multilingual.

### 5. E.O. 13166 WILL RESULT IN A NEW WAVE OF CIVIL RIGHTS LITIGATION

Because it creates a Title VI entitlement to accurate and timely services in the preferred language of a LEP person, E.O. 13166 is certain to unleash a flood of costly civil rights litigation alleging damages to individuals and classes of individuals. Moreover, conflict is sure to arise over the issue of mistaken translations and faulty interpretations that will provide fodder for endless litigation and court battles over the

 <sup>&</sup>lt;sup>4</sup> The Christian Science Monitor, "Quebec Secession Revisited," Nov. 23, 1998.
 <sup>5</sup> The Sacramento Bee, "Translator rule a burden, doctors say," Oct. 9, 2000

meaning and nuances of non-English words. Courts will be called on to reconcile linguistic disputes of Sisyphean dimensions.

## 6. TITLE VI WILL SPILL OVER AND REDEFINE ILLEGAL DISCRIMINATION UNDER TITLE VII

Although E.O. 13166 is limited in application to illegal discrimination by government agencies as defined and prohibited by Title VI, there can be no doubt that the same definition of "national origin discrimination" would carry over and be applied to Title VII, which defines and prohibits discrimination by private entities. Thus the ultimate impact of E.O. 13166 will be to force the whole of society to become multilingual or face prosecution for violating the civil rights of non-English speaking persons. The economic impact on the private sector of such compulsory multilingualism is beyond calculation.

### 7. E.O. 13166 IS DESTRUCTIVE OF NATIONAL UNITY

Twenty-six states have enacted laws declaring English their official language. Often this has been the result of citizen's initiatives adopted by margins ranging from 2-1 to 9-1. As stated by Winston Churchill "The gift of a common language is a priceless inheritance." Until today America has been almost uniquely successful in assimilating an incredibly diverse stream of immigrants in large part because new arrivals have had to learn English.

The effort to force a reversal of roles and compel Americans to accommodate the languages of an immigrant stream more diverse that at any time in American history, is certain to shatter the foundation of our national unity with the passage of time.

### THE LEGISLATIVE REMEDY

Mr. Chairman, when the Subcommittee issues its report we respectfully request that you review E.O. 13166 and highlight it as an example of how the power to issue executive orders has been misused. We also urge you and the other members of the Subcommittee to lend your support to H.R. 969, a bill introduced by Representative Bob Stump that would nullify E.O. 13166, and which has already attracted 40 cosponsors.

Thank you for the opportunity to present our views.

Testimony to
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

March 28, 2001

By
Steve Workings
Executive Director
English Language Political Action Committee
P.O. Box 9558
Washington DC 20016
301-933-4161

### Mr. Chairman and Members of the Committee:

Thank you very much for the opportunity to present our views on Executive Order 13166. My name is Steve Workings, and I am the Executive Director of the English Language Political Action Committee (ELPAC). ELPAC, founded in 1984, engages in political and campaign related activities to promote and protect the role of English as our common language in the United States. We are funded entirely by private citizens; in fact federal law prohibits us from receiving funding from any corporation or other official English organization.

We urge this Committee to take action to block the implementation of Executive Order 13166. EO 13166 was issued last August and agencies are currently promulgating rules under it. EO 13166 equates language and national origin, which makes any state, local or private language-related rule subject to challenge under Title VI of the Federal Civil Rights Act. This equation of language and national origin is contrary to the statute, ignores 30 years of undisturbed judicial interpretations, and defies common sense. A person's choice of language is changeable, and is not the same as the person's national origin.

Executive Order 13166 requires federal agency programs to be approved under and be subject to the Department of Justice's new Policy Guidance on assistance to Limited English Proficient (LEP) persons. The Justice Department's Policy Guidance similarly equates language and national origin. The Policy guidance expands this equation to federal grantees. "Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title

VI and its implementing regulations." In addition, because of the use of Title VI definitions of national origin in Title VII and IX cases, this equation of language and national origin will be applied in private employment cases, and perhaps other areas as well

Under Executive Order 13166 and the Justice Department Policy Guidance, it is not enough to be neutral about language. To avoid a charge of national origin discrimination, an agency, grantee or employer must affirmatively provide language assistance.

Though the extent of assistance is supposed to be determined by a variety of factors, at a minimum, the agency, grantee or employer must provide at least oral translation services if only one person requests it. The Policy Guidance requires, in most cases, at least the use of "one of the commercially available language lines to obtain immediate interpreter services." Though not stated, apparently the cost of such services, which can be as high as \$4.50 per minute plus "set-up" fees, is to be borne by the agency, grantee or employer subject to a potential charge of national origin discrimination.

The crux of this dispute is the equation of a person's choice of language to the person's national origin. To have a private right of action, a claimant must come within one of the recognized Title VI classes; the class at issue in this case is "national origin." No particular language was singled out as a proxy for discrimination against a protected class, thus the question is whether a choice of using English (as opposed to choosing to use languages other than English) is national origin discrimination.

The answer must be no.

For many years Congress has visited language-related proposals, including legislation to declare English the official language of the United States, to reform bilingual ballots and to eliminate bilingual education. During this time, enormous changes have occurred elsewhere, especially in the area of bilingual education.

In 1998, for example, California voters overwhelmingly adopted Proposition 227, an initiative driven by parents of limited-English proficiency ("LEP") children who wanted their kids to learn English. Steinberg, "Increase in Test Scores Counters Dire Forecasts for Bilingual Ban," *The New York Times*, August 20, 2000, P. A1. The initiative, known as "English for the Children," eliminated most existing bilingual education programs, which taught children in their native languages ("native language instruction"). The English for the Children initiative substituted an intensive program of English language instruction, teaching the children English by teaching them in English. *Id*.

Two school years later, test scores indicate that teaching the children in English was a smashing success. <sup>1</sup> Test scores in most school districts jumped dramatically. *Id.* 

In second grade, for example, the average score in reading of a student classified as limited in English increased 9 percentage points over the last two years, to the 28<sup>th</sup> percentile from the 19<sup>th</sup> percentile in national rankings, according to the state. In mathematics, the increase in the average score for the same students was 14 points, to the 41<sup>st</sup> percentile from the 27<sup>th</sup>.

<sup>&</sup>lt;sup>1</sup>See, also, Pearce & Ryman, "English-only Receives Boost," Arizona Republic, Aug. 22, 2000, front page.

One of the principal backers of the prior method of "native language instruction" was Oceanside, Calif., Superintendent of Schools Ken Noonan, a founder of the California Association of Bilingual Education. Noonan, "I Believed That Bilingual Education Was Best.. Until the Kids Proved Me Wrong," *The Washington Post*, September 3, 2000, B1. Noonan fought Proposal 227, but when the voters passed it, he led Oceanside School District into strict compliance with the new law's requirements. *Id.* The results: Oceanside's test scores improved by 19 percentage points since implementation of the new law. *Id.* 

"I thought it would hurt kids," Mr. Noonan said of the ballot initiative, which was called Proposition 227. "The exact reverse occurred, totally unexpected by me. The kids began to learn – not pick up but learn – formal English, oral and written, far more quickly than I ever thought they would."

Steinberg, supra.

And the increase can be attributed to the new English immersion form of education:

Oceanside's performance was all the more striking when measured against the nearby district of Vista, where half the limited English speakers . . . continued in bilingual classes. In nearly every grade, the increases in Oceanside were at least double those in Vista, which is similar in size and economic background to Oceanside.

Id.

The success of California's elimination of bilingual education is spurring similar efforts in Arizona, Colorado, Massachusetts, New York and other states. *Id.* In Connecticut, a new law offers English instruction and parental choice opportunities similar to those in the California initiative. Pub. Act 99-121, "An Act Improving Bilingual Education," http://www.cga.state.ct.us/ps99/act/pa/1999pa-00211-r00sb-01083-pa.htm.

At the same time, however, federal agencies are mounting an aggressive attack on English-language policies and programs. After hearing about the Oceanside School District's success, the federal Department of Education challenged Oceanside's implementation of the new English-language instructional techniques. Diehl, "O'side district ripped over bilingual ed," North County Times, Oct. 3, 2000, front page, reprinted at http://www.onenation.org/0010/100300b.html (reporting on joint investigation between federal and state departments of education); Diehl, "Prop. 227 author criticizes investigation of O'side district," North County Times, October 4, 2000, reprinted at http://www.onenation.org/0010/100400c.html ("The district could not document that they follow their own policies and procedures").

Similarly, the Equal Employment Opportunity Commission is steadily increasing its attacks on employers who wish their employees to speak English on the job. The EEOC has promulgated a rule which presumes that an employer's rule requiring English in the workplace is national origin discrimination. 29 C.F.R. § 1606.7. The EEOC reports that in 1996, it reviewed 77 national-origin discrimination challenges to workplace language rules. U.S. Equal

Employment Opportunity Commission, "Court Speaks: English Only Rule Unlawful," Press

Release, Sept. 19, 2000, www.eeoc.gov/press/9-19-99.html. That number jumped to 253 in 1999, and 355 by September of 2000. *Id.* 

Virtually every federal court which has considered the issue has rejected the EEOC's interpretation. For example, the Ninth Circuit recently rejected the EEOC policy as *ultra vires*.

Garcia v. Spun Steak, 998 F.2d 1480, 1489-90 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994) (upholding English-language workplace rule to stop workers from hurling racial insults at coworkers).

Yet a recent exchange of letters with Congressman Tom Tancredo indicates that the EEOC is continuing to enforce its policy, even in jurisdictions which have rejected its interpretation.

Two dozen charges were resolved between August 1998 and August 1999. Some of the charges were filed in appellate circuits which had rejected the guidelines. The EEOC explains: "EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. . . . Of course the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law." Building on the EEOC's new enforcement effort, the Administration issued Executive Order No. 13166 (Aug. 11, 2000). Executive Order 13166 makes the same equation of language and national origin. Executive Order 13166 requires federal agencies to "provide meaningful access . . . to ensure that the programs and activities they normally provide in English are accessible to

LEP [Limited English Proficient] persons and thus do not discriminate on the basis of national origin."

Thus, at the same time that States are actively using more effective means to bring persons who do not speak English into the educational and social mainstream, the Executive Branch through Executive Order 13166 is impairing just those successful efforts. The Executive Branch, without any authorization by Congress or the courts, has equated language and national origin in a manner which will cause enormous amounts of litigation, and will stifle promising efforts to teach English to those who could benefit so much.

A Per Se Rule Equating Language With National Origin Has No Basis in Law or Fact, and Would Be Unworkable and Unwise.

Executive Order 13166 equates language and national origin. Sandoval v. Hagan, 197 F.3d 484, 508-09 (11th Cir. 1999); see, Pet. App. 22a-29a. Such a novel per se equation of language choice and national origin has no basis in law or fact, and would be unworkable and unwise.

A. A *Per Se* Rule Equating Language and National Origin Has No Basis In Law or Fact.

<sup>&</sup>lt;sup>2</sup>The Eleventh Circuit's analysis on this question was suspect. Compare, Pet App. 52a, "While existent case law is unclear as to whether language may serve as a proxy for intentional national origin discrimination claims of either a constitutional or statutory nature, this question is tangential to disparate impact analysis." (boldface added, italics in original), with Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984):

A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin.

Language, by itself, does not identify members of a suspect class.

1. A Per Se Rule Equating Language and National Origin Has No Basis in Law,

The language, history and interpretations of the Fourteenth Amendment and other federal laws do not support equating, *per se*, language and national origin.

Statutory Language:

"[T]he reach of Title VI's protection extends no further than the Fourteenth

Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n. 7 (1992). The Fourteenth

Amendment does not include the phrase "national origin." Nevertheless, discrimination on the

basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 n. 5 (1987). "Distinctions between citizens solely

because of their ancestry are by their very nature odious to free people whose institutions are

founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

No federal statute defines "national origin." Title VI of the Civil Rights Act of 1964 added "national origin," without definition, to the list of protected classes. 42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Legislative History:

See also, Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994)(affirming "the broadly-stated and thoroughly sensible ruling in Soberal-Perez").

Legislative history does not support a language-based definition of national origin. The U.S. Supreme Court has noted that the legislative history concerning the meaning of national origin, even under statutory law, is "quite meager." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). Nevertheless, "[t]he terms 'national origin' and 'ancestry' were considered synonymous." 414 U.S. at 89. During debate on the 1964 Civil Rights Act, Representative Roosevelt stated: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2,549 (1964).

The Supreme Court supports that assessment: "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88; *see also, Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-73 (9th Cir. 1988) (persons of Serbian national origin are members of a protected class under Title VII).

Administrative Interpretations:

As noted above, there are now three administrative interpretations which equate language and national origin. The oldest<sup>3</sup> is the EEOC's presumption against requiring the use of English on the job. 29 C.F.R. § 1606.7. The newest are the interlocked Executive Order 13166 (August

<sup>&</sup>lt;sup>3</sup> The EEOC presented its proposed interpretive guidelines to the Fifth Circuit (prior to the creation of the 11<sup>th</sup> Circuit), but the Fifth Circuit rejected the interpretation in *Garcia v. Gloor*, 618 F.2d 264, 270 (5<sup>th</sup> Cir. 1980), cert. denied, 449 U.S. 1113 (1981)("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin.").

11, 2000), and the Justice Department's Policy Guidance on National Origin Discrimination Against Persons With Limited English Proficiency.

Numerous courts have reviewed the EEOC Guidelines and have rejected them and their underlying equation of language and national origin. See, e.g., Garcia v. Spun-Steak, 998 F.2d 1480, 1489-90 (9th Cir. 1993), cert. den. 512 U.S. 1228 (1994)(EEOC Guidelines equating language and national origin were ultra vires); Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981)(upholding English-on-the-job rule for non-English-speaking truck drivers); Garcia v. Rush-Presbyterian St. Luke's Medical Center, 660 F.2d 1217, 1222 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); Long v. First Union Corp., 894 F.Supp. 933, 941 (E.D. Virginia, 1995 ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."), affirmed, 86 F.3d 1151 (4th Cir. 1996).

### Judicial Interpretations:

The Supreme Court has never held that the language a person chooses to speak can be equated to the person's national origin. Though this issue was briefed and discussed in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court did not make a holding on this question. "Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a result, it violates the Equal Protection Clause. . . We need not address that argument here." 500 U.S. at 360.

<sup>&</sup>lt;sup>4</sup>Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926), sometimes cited to equate language and national origin, involved intentional discrimination on the basis of ancestry rather than language, because the law there was designed "to affect [Chinese merchants] as distinguished from the rest of the community." 271 U.S. at 528.

The Circuit Courts, on the other hand, have rejected such an equation. See, e.g., Soberal-Perez v. Heckler, 717 F.2d at 41:

A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

See, also, Toure v. United States, 24 F.3d at 446 (affirming Soberal-Perez and rejecting request for multilingual forfeiture notices). "A policy involving an English requirement, without more, does not establish discrimination based on race or national origin." An v. General Am. Life Ins. Co., 872 F.2d 426 (9th Cir. 1989)(table). A few cases indicate that if the language policy is a pretext for intentional discrimination, a language-related rule might violate national origin rules. In addition, two recent lower court decisions have adopted the EEOC's interpretation equating language and national origin. See, e.g., EEOC v. Synchro-Start Products, 29 F.Supp.2d 911, 915 n. 10 (N.D. Illinois, 1999)(on advice of law clerk, Judge Shadur was "staking out a legal position that has not been espoused by any appellate court."); EEOC v. Premier Operator Services, 113 F.Supp.2d 1066 (N.D. Texas, 2000)(Magistrate Judge Stickney, rejecting appellate cases against EEOC Guidelines and relying on Synchro-Start Products and Judge Reinhardt's dissent from

<sup>&</sup>lt;sup>5</sup>The circuit courts have found a Sixth Amendment right to an interpreter at criminal trials. See, e.g., United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970). But see, Abdullah v. Immigration and Naturalization Service, 184 F.3d 158, 165-66 (2d Cir. 1999)(distinguishing between "government-initiated proceedings seeking to affect adversely a person's status and hearings arising from the person's affirmative application for a benefit").

<sup>&</sup>lt;sup>6</sup>For example, Judge Reinhardt wrote, in an opinion vacated by the Supreme Court, that "since language is a close and meaningful proxy for national origin, restrictions in the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment." *Viniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9<sup>th</sup> Cir. 1995), vacated, sub nom., Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

denial of rehearing *en banc* in *Spun Steak*, found disparate treatment of Hispanic employees in the promulgation of an English-workplace rule).

But almost all cases, including all Circuit decisions, have rejected the equation of language and national origin. See, e.g., Gloor, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); Nazarova v. INS, 171 F.3d 478, 483 (7th Cir. 1999)(permitting deportation notices in English); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (permitting English benefit termination notices); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975)(civil service exam for carpenters can be in English); Garcia v. Spun Steak, 998 F.2d 1480, 1489-90 (9th Cir. 1993), cert. den., 512 U.S. 1228 (1994) (rejecting EEOC guidelines); Gonzalez v. Salvation Army, 985 F.2d 578 (11th Cir.)(table), cert. den., 508 U.S. 910 (1993)(rejecting employment discrimination claim); Jurado v. Eleven-Fifty Corp, 813 F.2d 1406 (9th Cir. 1987)(permitting radio station to choose language an announcer would use); Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981) (upholding English-on-the-job rule for non-English-speaking truck drivers); Garcia v. Rush-Presbyterian St. Luke's Medical Center, 660 F.2d 1217 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); Long v. First Union Corp., 894 F.Supp. 933, 941 (E.D. Virginia, 1995)("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job"), affirmed, 86 F.3d 1151 (4th Cir. 1996); Gotfryd v. Book Covers, Inc., 1999 WL 20925, \*8 (N.D. Ill. 1999)(rejecting attempt to use EEOC guidelines to establish hostile workplace); Magana v. Tarrant/Dallas Printing, Inc., 1998 WL

548686, \*5 (N.D. Texas, 1998) ("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII"); Tran v. Standard Motor Products, Inc., 10 F.Supp.2d 1199, 1210 (D. Kansas, 1998) ("the purported English-only policy does not constitute a hostile work environment"); Mejia v. New York Sheraton Hotel, 459 F.Supp. 375, 377 (S.D.N.Y. 1978) (chambermaid properly denied a promotion because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"); Prado v. L. Luria & Son, Inc., 975 F.Supp. 1349 (S.D. Fla 1997) (rejecting challenge to English workplace policy); Kania v. Archdiocese of Philadelphia, 14 F.Supp. 2d 730, 733 (E.D. Penn. 1998) (surveying cases: "all of these courts have agreed that – particularly as applied to multilingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.").

There is, therefore, no basis in the terms, history or interpretation of "national origin" which supports a per se rule equating a person's language and that person's national origin.

II. A Per Se Rule Equating Language and National Origin Has No Basis in Fact.

Spanish is spoken in many countries, impairing a determination that the language itself determines, under Espinoza, "the country from which his or her ancestors came." 414 U.S. at 88. Thus Hispanics are usually within a protected class not by virtue of language spoken, but by ancestry. Hernandez v. Texas, 347 U.S. 475, 479-80 (1954)(persons of Mexican descent wrongfully excluded from jury duty).

<sup>&</sup>lt;sup>7</sup>At least 13 countries have Spanish as their official or national language. A. Blaustein & D. Epstein, Resolving Language Conflicts: A Study of the World's Constitutions, (1986).

A per se rule equating a person's language and national origin would be both over- and under-inclusive. Many Hispanics do not speak Spanish.<sup>8</sup> Many non-Hispanics speak Spanish.<sup>9</sup>

Nor is language an immutable characteristic, like "the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Although, for some people, learning a new language may be a difficult or unfinished task, *Garcia v. Gloor*, 618 F.2d at 270, in that aspect language may be much like alienage – not statutorily protected. Although alienage cannot be changed before qualification for naturalization, it can be changed eventually. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973)(Rehnquist, J., dissenting).

### A Per Se Rule Equating Language and National Origin Is Unworkable

Providing services or assistance in many languages, as Executive Order 13166 proposes for federal agencies, contractors or grantees could be costly and difficult. In the simplest example, increasing the number of languages increases the possibility of translation errors.

Hernandez v. New York, 500 U.S. at 361, citing, United States v. Perez, 658 F.2d 654, 662 (9<sup>th</sup> Cir. 1981)<sup>10</sup>; Seltzer v. Foley, 502 F.Supp. 600, 603-4 (S.D.N.Y. 1980)(interpreter in magistrate's

<sup>&</sup>lt;sup>8</sup>The Rand Corporation reported in 1985 that by the second generation half the Hispanic immigrant children in California spoke English exclusively. Zall/Jimenez, Official Use of English: Yes/No, 74 A.B.A. J. 34, 35 (1988). And as the recent California school test scores described above demonstrate, language minority children can learn English quickly if not stopped by misguided government policies.

<sup>&</sup>lt;sup>9</sup>The American Council of Teachers of Foreign Languages reported that 3,219,775 American high school students were taking Spanish language courses in 1994. Draper & Hicks, Foreign Language Enrollment in Public Secondary Schools, Fall 1994, Table 2. Contrary to popular belief, "people who got good grades in high school Spanish classes remembered much of the Spanish vocabulary up to 50 years after taking their last course." College Classes Spur Lifelong Math Memory, 138 Science News 375 (1990).

 $<sup>^{10} \</sup>rm{The}$  Supreme Court quoted testimony from United States v. Perez, 658 F.2d 654 (CA9 1981), to illustrate the sort of problems that may arise even with an official translation:

courtroom changed the motive of the accused without her knowledge). A 1985 report found that of 1,400 applicants, only 30 passed the federal certification test for Spanish language courtroom interpreters. "Problems Cited in Greater Use of Court Interpreters," 16 CRIM. JUST. NEWSL. 13, 2 (1985).

More than 300 languages are spoken in the United States. U.S. Bureau of the Census, 1990 Table COHL 13: "Language Spoken At Home and Ability to Speak English for Persons 5 Years and Over." Many of those languages contain distinct dialects in which the same words mean different things. S. Berk-Seligson, The Bilingual Courtroom, 5 (1990) (citing Italian, Napolese and Sicilian as "different varieties of the same language."). Some of these dialectical differences could be legally significant, such as the Spanish word "guagua," which means "baby" in Nicaragua or Chile, but "bus" in the Dominican Republic. "The Fine Art of Interpreting in a Miami Court," New York Times, May 8, 1984, at A15, col. 1.

Courts are justifiably reluctant to impose those costs on governments which have not chosen to bear the burden. See, e.g., Abdullah v. INS, 184 F.3d at 166:

Shall we require the provision of interpreters in Urdu, Hindi and Bengali? Executive Order 13166 would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great.

<sup>&</sup>quot;DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar,

<sup>&</sup>quot;THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to

me "DOROTHY KIM: I understood it to be a restroom, I could better believe they would meet in a restroom rather

than a public bar if he is undercover.

"THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the -

<sup>&</sup>quot;DOROTHY KIM: I understand the word La Vado [sic] - I thought it meant restroom. She translates it as bar.
"MS. IANZITI: In the first place, the jurors are not to listen to the Spanish, but to the English. I am a certified

<sup>&</sup>quot;DOROTHY KIM: You're an idiot." Id., at 662.

Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." Id., at 663. The juror later explained that she had said "it's an idiom" rather than "you're an idiot," but she was nevertheless dismissed from the jury. Ibid. 500 U.S. at 361, n. 3.

See, also, Nazarova v. INS, 171 F.3d at 483:

[T]he logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

See further, Toure, 24 F.3d at 446 (providing forfeiture notices in preferred language would "impose a patently unreasonable burden"); Vialez v. New York City Hous. Auth., 783 F.Supp. 109, 120-24 (S.D.N.Y. 1991) ("insurmountable and unjustified burden on the Housing Authority").

### A Per Se Rule Equating Language and National Origin Is Unwise

The Supreme Court noted in *Holland v. Illinois*, that "[t]he earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." 493 U.S. 474, 488 (1990). It would be difficult to cabin the lower court's equation of language choice and national origin. The most critical example is the Administration's adoption of the lower court's opinion in Executive Order 13166 to expand the equating of language and national origin to every federal agency, contractor and grantee.

Executive Order 13166 could generate unintended controversies in other areas far beyond any intended reach:

Language of Government Activities:

24 States have declared English their official languages.<sup>11</sup> These declarations are the subject of substantial litigation. *See, e.g. Arizonans for Official English*, No. 95-974, 520 U.S. 34 (1997).

<sup>&</sup>lt;sup>11</sup>Alabama: Ala. Const. Amend. 509 (1990); Alaska: Ak. Stats. § 44.12,330 (1998); Arizona: Ariz. Const. Art. XXVIII (1988) (negated by Arizona Supreme Court – 1999); Arkansas: Ark. Stat. Ann. 1-4-117 (1987);

Other cases, like the Sandoval case currently before the Supreme Court, involve challenges to governments' choices of English for internal operations. The lower court's analysis in Sandoval, for example, would have precluded the English-language civil service examination upheld in Frontera v. Sindell, 522 F.2d at 1218, and the English-language deportation, forfeiture, and benefit notices upheld in Nazarova v. INS, 171 F.2d at 483, Soberal-Perez v. Heckler, 717 F.2d at 41, Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973), Toure v. United States, 24 F.3d at 446, Alfonso v. Board of Review, 89 N.J. 41, 444 A.2d 1075, cert. denied, 459 U.S. 806 (1982), Guerrero v. Carleson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), cert. denied, 414 U.S. 1137 (1974), and Commonwealth v. Olivio, 369 Mass. 62, 337 N.E.2d 901 (1975).

Language of Education:

As noted above, the elimination of bilingual education reform is a rapidly-growing effort, driven by parents who want their children taught English. If the Executive Branch is allowed to equate language and national origin, the federal agencies would roll back these bilingual education reforms, crushing the hopes and dreams of these parents and condemning their

California: Cal. Const. Art. III, § 6 (1986); Colorado: Colo. Const. Art. II, § 30 (1988); Florida: Fla. Const. Art. II, § 9 (1988); Georgia: Ga. Code Ann. § 50-3-30 (1986); Hawaii: Hawaii Const. Art. XV, § 4 (1978) (Hawaiian is second language); Illinois: III. Rev. Stat. Ca. I., § 3005 (1969); Indiana: Ind. Code Ann. § 1-2-10-1 (1984); Kentucky: Ky. Rev. Stat. § 2.013 (1984); Mississippi: Miss. Code Ann. § 3-3-31 (1987); Missouri: Mo. Stats. § 1-028 (1999); Montana: Mont. Code Ann. § 1-1-510 (1995); Nebraska: Neb. Const. Art. I, § 27 (1920); New Hampshire: 1995 N.H. Laws 157 (1995); North Carolina: N.C. Gen. Stat. Ch. 145, § 12 (1987); North Dakota: N.D. Cent. Code, § 54-02-13 (1987); South Carolina: S.C. Code Ann. § 1-1-(696-698) (1987); South Dakota: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); Tennessee: Tenn. Code Ann. § 4-1-404 (1984); Virginia: Va. Code, § 22.1-212.1 (1950); Wyoming: Wyo. St. 8-6-101 (1996). An initiative measure declaring English the official language is on the November 7, 2000 Utah ballot.

children to what the New York Times called "a bilingual prison." "A Bilingual Prison," The New York Times, September 21, 1995, A22.

Language of the Workplace:

Courts have overwhelmingly rejected the EEOC's presumption that English-on-the-job rules are national origin discrimination. See, e.g., Gloor, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); Spun-Steak, 998 F.2d at 1489-90 (EEOC Guidelines are ultra vires). These decisions would be wiped away if we recognize a relationship between language and national origin posed by Executive Order 13166.

# Federal Rules Which Affect Core Rights of the States to Choose English for Internal Operations Must Be Explicit

Executive Order 13166 will require the State to speak in a language which its political processes have decided will harm its interests. <sup>12</sup> States have a historic right to "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). Though *Rosenberger* is a First Amendment case, it reflects concern for States' sovereignty.

A State defines itself as a sovereign "[t]hrough the structure of its government and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460

<sup>&</sup>lt;sup>12</sup>89% of Alabama's voters approved the State's English Language Amendment in 1990. Secretary of State, Certification of Results of Election Held June 5, 1990, June 20, 1990, 1.

(1991). Several of these areas of State sovereignty lie beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2264 (1999)("Such plenary federal control of state government processes denigrates the separate sovereignty of the States.").

This is not a new thought: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

The Tenth Amendment protects the reservation of "original powers" of a State. U.S. Term Limits v. Thornton, 514 U.S. 779, 801 (1995); Alden, 119 S.Ct. at 2259, quoting, Nevada v. Hall, 440 U.S. 410, 425 (1979).

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, States have been permitted to use English. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned.").

And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, Foundations of American Independence, 1763-1815, 18 (1972).

Like the choice of location of its own State Capitol, a State's choice to use English in conducting its affairs is a "function essential to [the State's] separate and independent existence." Coyle v. Wyoming, 221 U.S. 559, 595 (1911). Choice of the English language for internal State operations is thus an "original power," a core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 638 (1999). There are few, if any, such abrogations, and those identified are neither clear nor remedial.

Some will try to justify Executive Order 13166 and their view of federal regulatory power over States' internal language choices by pointing to *Lau v. Nichols*, 414 U.S. 563 (1974)(school district must provide some assistance to students who could not otherwise obtain an education). *See, e.g.*, 197 F.3d at 495-97, 504-07. Yet *Lau* was a narrow decision – focused specifically on a particular problem in education – and not a clear, remedial abrogation. If left intact, Executive Order 13166 will encourage courts and others to use *Lau* to overrule States' internal decisions in other non-educational contexts, shoving that narrow, education-based decision far beyond its original limits.

Congress should protect these core States' rights by halting the implementation of Executive Order 13166.

Mr. Chairman and Members of this Committee, ELPAC, and the voters we represent, strongly urge you to move swiftly and clearly to block Executive Order 13166.

Thank you very much.

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